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IN THE

Supreme Court of the United States

OCTOBER TERM, 1938.

No. 771.

UNITED STATES OF AMERICA,
Appellant,

v.

ROCK ROYAL CO-OPERATIVE, INC., *et al.*,
Appellees.

On Appeal from the District Court of the United States for the Northern District of New York.

BRIEF

for

ROCK ROYAL CO-OPERATIVE, INC.,
JETTER DAIRY COMPANY, INC.,
and
SCHUYLER JUNCTION, NEW YORK, MILK SHED CO-OPERATIVE, INC.

WILLARD R. PRATT,
Attorney for Appellees, Jetter Dairy Co., Inc., Schuyler Junction, New York, Milk Shed Co-operative, Inc., Counsel for Rock Royal Co-operative, Inc.,
Office and P. O. Address,
201-202 U. G. & E. Bldg.,
Utica, New York.

THE REPORTER COMPANY, Inc., Walton, N. Y.
1939

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No. 771.

UNITED STATES OF AMERICA, *Appellant*,

v.

ROCK ROYAL CO-OPERATIVE, Inc., *et al.*, *Appellees*.

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF NEW YORK.

Brief for Rock Royal Co-operative, Inc., Jetter Dairy Company, Inc., and Schuyler Junction New York Milk Shed Co-operative, Inc.

STATEMENT.

Parties to the Appeal.

The appellant, United States of America, in this case was plaintiff in the Court below. Three additional parties plaintiff were added by intervener, viz:

a. Holton V. Noyes, as Commissioner of Agriculture and Markets of the State of New York, herein referred to as "Commissioner."

b. Dairymen's League Co-operative Association, Inc., herein referred to as "Dairymen's League" or "League."

c. Metropolitan Co-operative Milk Producers Bargaining Agency, Inc., herein referred to as "Bargaining Agency."

The appellees are:

a. Rock Royal Co-operative, Inc., herein referred to as "Rock Royal."

b. Schuyler Junction New York Milk Shed Co-operative, Inc., herein referred to as "Schuyler Junction."

c. Jetter Dairy Company, Inc., herein referred to as "Jetter."

d. Central New York Co-operative Association, Inc., herein referred to as "Central Co-operative."

In the appellant's brief, the term "appellees" is employed solely with reference to Rock Royal, Schuyler Junction, and Jetter from page 41 to the end, and elsewhere.

Central Co-operative, the remaining appellee, proceeded upon a different theory and raised different issues than those presented by the appellees represented in this brief. The word "appellees" is used in this brief to refer only to those here represented.

The Statute and Regulation Involved on This Appeal.

The statute involved is the Act of May 12, 1933 (48 Stat. 31), as amended August 24, 1935 (49 Stat. 750), and as re-enacted and amended by the Agricultural Marketing Agreement Act of 1937 (50 Stat. 246), Title 7, U. S. C. A., Secs. 601, *et seq.*, hereinafter referred to as the "Act."

The regulation involved is Order No. 27, Order • • • Regulating Such Handling of Milk in the New York Metropolitan Marketing Area As Is In Interstate Com-

merce, and As Directly Burdens, Obstructs, or Affects Interstate Commerce, issued on August 5, 1938 (effective September 1, 1938), by the Secretary of Agriculture of the United States pursuant to the provisions of the Act, and is hereinafter referred to as "The Order" (The Order printed R. 11 to 24, incl.).

Questions Presented.

The issues raised by appellees present no challenge to the general power of Congress to regulate the marketing of milk by a marketing order. The challenge is to the application of the statute as applied in Order No. 27, and to Section 8 (5) (F) of the Act, if the Court should hold the manner of its application in the Order as mandatory under the Act.

Judge Cooper, in his opinion (R. 751), said:

> "The laudable purpose of the statute to procure for farmers prices for their milk commensurate with their purchasing power at specified periods of better balance of purchasing power is not criticized or condemned. Nor is there any denial that the production or sale of milk presents peculiar problems due in part to excess supply at certain times and almost scarcity at others.
>
> "The challenge is to the means set up in the statute and order for dealing with the conditions. These means constitute, defendants claim, such gross discrimination as to drive defendants out of business and confiscate their property by the arbitrary discrimination therein provided and without any lack of efficiency on the part of the defendants."

Appellees do challenge the provisions of Section 8c (19), as amended, as an invalid delegation of legislative power to co-operative corporations (Fifth affirmative defense, Jetter answer, R. 100, 101).

Chief among the issues raised by the appellees, are the following:

1. Whether the provisions of the Act, as applied in Order No. 27, are a valid exercise by Congress of power to regulate interstate commerce.

2. Whether the Act as applied in Order No. 27, hereinafter referred to as "The Order," deprives appellees of liberty or property without due process, in violation of the Fifth Amendment.

For brevity, the Constitution of the United States will be referred to herein as "The Constitution," and the Fifth Amendment to the Constitution will be referred to as "The Fifth Amendment."

3. Whether the Order, as promulgated, was authorized by Section 8 (5) (F) of the Act, which provides that a co-operative marketing association qualified under the provisions of the Act of Congress of February 18, 1922, as amended, known as the "Capper-Volstead Act," engaged in making collective sales or marketing of milk or its products for the producers thereof, shall not be prevented from blending the net proceeds of all its sales in all markets in all use classifications, and making distribution thereof to its producers in accordance with the contract between the association and its producers; and, if the Order is so authorized, whether the same deprives the appellees of liberty or property, without due process, in violation of the Fifth Amendment.

4. Whether, notwithstanding the Findings by the Secretary of Agriculture in support of all the terms and conditions contained in the Order, the validity of the Order as applied was the subject of adjudication by the Trial Court.

5. Whether there was a valid determination of the Secretary of Agriculture, approved by the President, that the Order was favored by at least two-thirds of the producers who, during the representative period determined by the Secretary, were engaged in the production of milk for sale in the marketing area. Appellees asserted that the referendum conducted by the Secretary was a nullity; that it did not comply with the statute; that such vote as was had in favor of the Order, was

induced by misrepresentations as to the terms and effect of the Order, and did not in any sense, reflect the actual approval or disapproval of the producers with reference thereto.

6. Whether the Order, and particularly certain alleged discriminatory provisions thereof, are authorized by the Act, and if so, whether the Order, and the Act as applied therein, constituted an arbitrary discriminatory regulation, depriving appellees of liberty and property without due process, contrary to the Fifth Amendment.

7. Whether the Order, and the Act as applied therein, takes the property of appellees for (an alleged or) a public use, and transfers the same to others without just compensation in violation of the Fifth Amendment.

These propositions will be set out in detail in the argument. They involve the claim that the Order, by its terms, and the Act as applied, constitute a regulation solely in the interests of private monopoly and against producer interests, contrary to the declaration of policy and clear intent of the Act, and contrary to the Fifth Amendment to the Constitution of the United States.

Appellees also maintain that certain of the discriminatory provisions complained of are without authority in the Act. Appellant contends these issues are not available to appellees. This is discussed *infra* (pp. 10 *et seq.*).

However, this is not necessary to support the judgment appealed from. The Court's decision is based on discrimination; the taking of appellees' property without due process and without compensation; the unconstitutional interference with the liberty of the several appellees; and the fact that the referendum vote was secured by misrepresentation, and was a nullity.

Appellees do not challenge, nor did the Court review, the administrative Findings and Conclusions of the Secretary (other than as based on the referendum vote).

Proceedings Below.

This action was commenced, under authority of 7 U. S. C. A., Sec. 608a (6) as amended, by the United States of America, October 27th, 1938, against appellees, Rock Royal, Central Co-operative, and Schuyler Junction, for a mandatory injunction restraining appellees from handling milk in violation of the Order, and requiring appellees to comply therewith. Appellees are all co-operative corporations of milk producers. (A separate brief is presented on behalf of Central Co-operative.)

November 23, 1938, the Government commenced an action against the appellee, Jetter, a proprietary handler or milk dealer, in the same Court in an almost identical action, seeking identical relief.

December 2, 1938, the two cases were consolidated (R. 61).

Holton V. Noyes, as Commissioner, etc., intervened as a party plaintiff, and on December 15th, filed a complaint in the consolidated cause (R. 55).

Appellees, Rock Royal, Jetter and Schuyler Junction, duly filed answers; admitted the issuance of Order No. 27 by the Secretary of Agriculture (herein referred to as "Secretary"), and the issuance of Official Order No. 126, by the Commissioner; denied the allegation in plaintiff's complaint (Paragraph IX, Rock Royal complaint, R. 3, and Paragraph VII, Jetter complaint, R. 42), that Order No. 27 contained "the terms and conditions authorized by the Act, *and no others*" (Rock Royal answer, Paragraphs First and Ninth, R. 63; Jetter answer, Paragraph Third, R. 85, and Paragraph Twentieth, R. 87-88); admitted that a purported referendum was conducted by the Secretary and Commissioner; challenged the validity of the referendum on the ground that the legal effect of the Orders was directly contrary to widespread public representations made by the Dairy Section of the U. S. Department of Agriculture, by the proponents of the Order, and others, hereinafter referred to.

Appellees also asserted, as hereinbefore stated, that the Order, and the Act as applied therein, were discriminatory, confiscatory and void as contravening the Fifth Amendment to the Constitution.

The issues thus raised, were pleaded as affirmative defenses in the answers of Rock Royal, Schuyler Junction, and the Jetter amended answer.

Motions to strike the affirmative defenses on the ground that they failed to constitute a legal defense, and were redundant, immaterial, impertinent and scandalous (R. 83, 103), were denied (R. 104), opinion thereon (R. 105). The motions were argued December 13 (R. 84), and December 14th (R. 104). Present at the argument of the motions December 13-14, 1938 (R. 84-104), were Seward A. Miller, Esq., attorney for Dairymen's League, and Edmund F. Cooke, Esq., attorney for the Bargaining Agency, who stated to the Court that their clients were interested and involved in the allegations contained in defendants' answers, and that they wished to be heard, and might wish to intervene in the action. Judge Cooper, in his opinion denying the motion to strike, said:

> "It is quite true that the Secretary is not responsible for the acts of the non-governmental organizations but the proposed order was admittedly suggested by the Metropolitan Bargaining Agency, of which the Dairymen's League and others are members and had representation upon its board. It is not so important that the Secretary did not send out such publications as it is whether he had knowledge and whether or not the Referendum vote was induced thereby."
>
> * * * * * *
>
> "The Secretary is not burdened to any extent with defending the acts of these non-governmental agencies, for only evidence as to which there can be little or no dispute will be received and *these agencies can be made parties hereto, if they desire, to present any evidence they desire, but only*

with the consent of the plaintiff." (Emphasis supplied.) (R. 109.)

The statement on page 9 of appellant's brief, that the Bargaining Agency and Dairymen's League intervened "at the suggestion of the District Court," is mistaken, except as above stated.

Thereafter, the Dairymen's League and Bargaining Agency moved and were permitted to intervene as parties plaintiff (motions and order permitting intervener apparently not printed).

The intevener was permitted in order that the Bargaining Agency and Dairymen's League might refute appellees' contention that the Order, and its complementary Order (Official Order No. 126, promulgated by intervening plaintiff, Commissioner Noyes), were designed, proposed and enacted as part of

> "a program or scheme to procure for several large member co-operative corporations (of the Bargaining Agency), including the Dairymen's League, a competitive advantage over proprietary corporations and dealers, including this defendant and others similarly situated, in the purchase and sale of milk, and thereby to discriminate against defendant and said others, and to establish in said Bargaining Agency members and companies dealing with them, a monopoly in the purchase and sale of milk in the Metropolitan Area. Said scheme had as its object, the confiscation of this defendant's property rights without due process, and the denial to it of equal protection of the law, contrary to the Fifth and Fourteenth Amendments to the Constitution" (Amended answer of Jetter Dairy Company, R. 91).

The Government assumes at various places in its brief, that the specific defenses, set out in the Jetter answer, following the above general statement, rest upon the Anti Trust Laws. This is not true. Appellees recognize that the Anti Trust Laws may, in effect, be repealed by other subsequent statutes, such as the Act. The Jetter answer, paragraph Thirty-second (R. 100), states:

"Such discriminatory competitive advantage to defendant's competitors, *tends to create a monopoly in said competitors, over this defendant in the purchase and sale of milk,* and permits some or all of said chief competitors to engage in an actual combination or conspiracy in restraint of trade against this defendant and others in a like situation, *and thereby to confiscate its property and property rights without due process and to deny it equal protection of the law in violation of the Fifth and Fourteenth Amendments.*"

(Order 126, enacted under the New York State statute, Chapter 383, Laws of 1937, was subject to the Fourteenth Amendment.)

Similar defenses are pleaded by appellees, Rock Royal and Schuyler Junction.

Paragraph Sixteenth, answer of appellee Rock Royal (R. 74-75), states:

"Sixteenth. Defendant for a Sixth affirmative defense alleges that it is not engaged in business as a distributor of milk, but acts only as a non-profit co-operative corporation in selling the milk of its producer members and others, if any, who deliver milk to its plant, to distributors for resale in the marketing area, described in said Orders.

"The dealer to whom defendant sells its milk is one of those to whom the discriminatory provisions of the said Orders apply, and thereby said Order No. 27 and Official Order No. 126, by their terms, and by the operation thereof, tend to discriminate against the customer purchasing milk of the defendant and to exclude it from the milk business, and *by such operation, exclude this defendant and its members from the sale of its milk and that of its members, and further tends to create a monopoly in the purchase and sale of milk, in handlers who are given a competitive advantage by the provisions of said Orders, to the exclusion of this defendant and others similarly situated.*"

This defense was based on discrimination, and not the Anti Trust Laws.

However, assuming the invalidity of the Order and the Act as applied therein, under the Fifth Amendment, then the Anti Trust Laws apply to the illegal acts of monopoly and restraint of trade found by the Court.

The Government's brief on this appeal is 200 pages long. Briefs have been, or are to be filed, by the three other appellants. For brevity, and to save repetition, the facts claimed by appellees will be discussed under the point to which they are applicable. The printed record was received by appellees April 14th; appellant's printed brief on April 16th. The case is to be argued April 24th, and appellees' brief must go to the printer April 21st, allowing only five days to brief this long and complicated record. Accordingly, this brief will reply principally to the brief of the appellant, United States.

ARGUMENT.

Constitutionality of the Act, as applied in Order No. 27.

POINT I.

The order is an arbitrary and discriminatory regulation, and an unwarranted and unconstitutional interference with the individual liberty of the several appellees.

Appellees represented in this brief, fall into two classes, viz:

1. Appellees, Rock Royal and Schuyler Junction are producer owned and controlled co-operative corporations. Rock Royal owns and operates one milk receiving station at Rock Royal, N. Y., and, Schuyler Junction operates a milk receiving station at Schuyler Junction, N. Y. Neither is engaged in any manufacturing operation (R. 163).

2. Appellee Jetter, is a New York stock corpo-

ration, operating country receiving plants at Bridgewater, N. Y.; Oriskany Falls, N. Y.; and Solsville, N. Y. It has facilities for separating milk for the manufacture of fluid cream at its Solsville plant.

While there appears to be a difference of interest as between the co-operatives and Jetter, actually, their common interests are almost identical, as will appear hereafter.

The co-operative appellees are of the small type, known in the industry as "independent co-operatives." The Jetter Company is of the type known as an "independent dealer" (R. 134).

Rock Royal and Schuyler Junction dispose of their milk to independent dealers, such as Jetter, which have to meet competition of the large proprietary dealers (handlers), Bordens and National Dairy, as well as that of the Dairymen's League (R. 134-135), which handles 34% of all the milk produced in the area (Stip. Fact ¶48, R. 262).

The practical effect of the Order is to create a monopoly in the sale of fluid milk into the three large groups: viz: Dairymen's League, Bordens and National Dairy (Sheffields). This is accomplished by means of the Order, which was designed to and does give to the three large groups, substantial competitive advantages which can be, *and actually have been, used against appellees in cut-throat price competition.*

Milk has been generally sold by the three large groups, at less than cost to appellee Jetter, and dealers purchasing milk of appellees, Rock Royal and Schuyler Junction. Thereby, the customers of appellee Jetter, and dealers purchasing from the other appellees, were captured. The resale price of milk which they could obtain from such customers as they retained, by meeting competition, was also reduced far below cost. Appellee Jetter, under that condition, had two alternatives. One was to go out of business immediately, or continue

until its capital was wholly exhausted. This would require but a short time.

We will now take up the various discriminatory phases of the Order.

A. The Order, by Regulating All of the Business of Appellee Jetter, and Only Parts of the Business of the League, Bordens and Sheffields (and That in Varying Degrees), Gives Discriminatory Competitive Advantages to the Latter.

Article VII, Section 1 of the Order refers to "Payments to Producers." This section provides that handlers, *other than co-operatives,* shall pay a uniform price for milk sold in the marketing area; *exempts co-operatives* from such provision; *permits a blended price,* which in effect reduces the price paid for fluid milk sold in the area.

Judge Cooper, in the 25th Finding of Fact (R. 132), refers to this provision, quoting Exhibit No. 9, Pamphlet issued by the Dairy Section, U. S. Department of Agriculture (pamphlet printed R. 436; portion quoted, R. 445):

> "25. Handlers selling milk received from producers in the production area, but marketed outside of the marketing area, are under no requirement to pay the uniform price for such milk, nor do they pay into the Producer Settlement Fund for the difference between the uniform price and the actual market value of such milk, or otherwise. Such handlers are permitted to blend prices paid or purported to have been paid for such milk sold in other markets, with the uniform price announced by the Administrator for milk sold in the area, thereby reducing the actual price paid by such handlers, for milk sold in the Metropolitan Area, in competition with milk sold by the defendants.
>
> "The construction placed upon said provisions of Order No. 27 by the Secretary is set forth in a pamphlet issued by the United States Department of Agriculture, Dairy Section, in October, 1938, on the cover of which is printed 'Market Ad-

ministrator, New York Metropolitan Milk Marketing Area, 95 Madison Avenue, New York, N. Y.' Page 14 of said pamphlet states:

"'Uniform Pool Prices for Producers

"'Handlers are required to pay the uniform pool, or blended price, calculated by the Market Administrator, to all producers delivering milk during any month unless the handler has received milk and sold it as Class I milk outside of the Marketing Area. In such instance, the handler is required to pay the uniform price to each producer on that part of the milk received which is equal to the proportion of his milk to which minimum prices are applicable. *For the remainder of each producer's milk, the handler may pay such prices as he sees fit,* but is required to furnish the producer with a statement of the percentage of the producer's milk paid for the uniform price.'

"'Thus, the handler may multiply the total pounds of milk sold by it in the area by the uniform price; multiply the total pounds of milk sold in other markets and which is called "unpriced milk," by "such prices as it sees fit;" add the totals, and divide by the total pounds of milk, to obtain the average of "Blended" price paid producers for all milk. *If the price figured by the handler for unpriced milk is lower than its actual market value, the handler, by blending, is thereby permitted to pay producers for all milk at less than the Order price, and less than the actual value thereof.*'" (Emphasis supplied.)

The Government, in its brief, page 26, cites a hypothetical case to show the manner of arriving at the uniform price paid to producers, other than those delivering to co-operative associations.

The case assumes the existence of two handlers, each handling 50% of all milk; that one handler uses only Class 1 milk of the value of $2.50 per cwt.; the other using only milk manufactured into butter at $1.00 per cwt. For each two cwt. of milk utilized, one-half brings $2.50 per cwt. and one-half, $1.00 per cwt., or $3.50 for two cwt. The blended or average price would be $1.75 per cwt.

Theoretically this is the base "uniform price" paid to all producers.

However, the blended or uniform price referred to, would not be the true base price paid to producers. Indeed, there is no general uniformity of base price actually received by producers.

Payments by dealers would fall into three classes, as follows:

1. Small dealers operating only in the marketing area, such as Jetter, which would have to pay the full uniform price.

2. Proprietary handlers operating in other markets, and who can manipulate the uniform price downward, limited only by the amount of sales in other markets.

3. Co-operatives (principally, and possibly, only the Dairymen's League), which are also distributors of milk, operating in other markets, and which also manipulate the producer price downward.

Throughout this case, milk sold in other markets, is referred to as "unpriced milk."

B. Competitive Advantages Under Article VII, Section 1, to Proprietary Handlers Operating in Other Markets.

We will first consider proprietary handlers operating in other markets. As an example, we take the Sheffield Farms Company (Sheffields). This Company sells milk in other markets, notably in New Jersey (details Exhibit 51, R. 675). While milk in the New York market, sold wholesale under the Order, brought only 8 to 9¢ per quart, delivered (Finding 63, R. 145), fluid milk sold wholesale in New Jersey in the dealer-to-store trade, brought 11¢ per quart in rural communities, and 12¢ per quart, in the more populous districts (R. 372).

We refer to wholesale milk, for that is the field in which general price cutting starts. Half of all the milk sold in the Metropolitan Area, is sold in the wholesale or dealer-to-store trade. Concerning this, the Dairymen's League

News of May 17th, 1938, Exhibit 24-A to Stipulation (R. 557) says:

> *"The only price that has remained at the established level is the retail Class 1 milk delivered to homes in the New York metropolitan area* and a relatively small percentage of the total volume of milk produced by members of the Association is sold in this way.
>
> *"Today more than half of all milk sold in the New York metropolitan district is handled through stores"* (Emphasis supplied).

The Sheffield Company, under Order No. 27, was required to account into the pool for fluid milk sold wholesale by it (and retail, as well) at $2.45 per cwt. In computing the price paid by Sheffields to its producers, it was at liberty to put in its unpriced milk at "such prices as it sees fit" (R. 445).

Applying this in a practical manner, in October, 1938, the uniform price was $1.91 per cwt. Sheffield paid its producers $1.87 per cwt. (R. 599). In that month, it reported total purchases of 67,306,590 pounds of milk, of which 7,254,320 pounds were used in fluid or Class 1 outside the market. This is called "unpriced" milk, Exhibit 43 (R. 673). Of the Class 1 milk sold by Sheffields in other markets, it sold 92.88% in New Jersey (Exhibit 51 [R. 676]). It also reported 307,311 pounds of milk in Class 2-A, cream, all sold in New Jersey.

The New Jersey price, fixed by the State Control Board, to producers for milk purchased within the State, for sale in Class 1, was $2.76 per cwt. (R. 372), 31¢ higher than the New York (Order) price. For Class 2-A, the fixed New Jersey price to producers, was $1.95 per cwt. (Defendants' Exhibit 63, recd. R. 372, not printed). Nevertheless, on the total of 7,561,631 pounds of "unpriced" milk sold as above stated (11.23% of the whole), the Sheffield Company reduced its blended price, by 4¢ per cwt. on all of its purchases. The amount of the reduction amounted to $26,922.60. This applied to 7,561,631 pounds of unpriced milk, amounts to $.356 per cwt. on the unpriced milk. Ac-

cordingly, Sheffields bought its unpriced milk at $.356 per cwt. less than the uniform price of $1.91, or at $1.554 per cwt. In other words, Sheffields blended its New Jersey sales of milk, which were actually worth at least $2.76 per cwt. with its other purchases, at $1.554 per cwt., thereby giving it a competitive advantage over handlers whose entire businesses were regulated by the Order.

The apparent, or possible advantage enjoyed by Sheffields in its fluid sales in New Jersey alone (the difference between $2.76 per cwt. and $1.554 per cwt., actual price figured in the blend, amounting to $1.206 per cwt. on 6,737,848 pounds, Defendants' Exhibit 51, R. 676), amounted to $81,257.86. **However, there was nothing in the Order, or the construction put upon it by the Secretary above referred to, to prevent Sheffields and others in a like situation from blending their New Jersey milk at 10¢ per cwt., or any other price calculated to bring the blend down to any competitive figure necessary to enable them to undersell their competitors.**

Sheffields used this competitive advantage to capture the trade of its less fortunate competitors. This is shown at various places in the evidence. Rose Paley testified (R. 290), that she purchased "Breakstone" milk from the Sheffield Company. The "Breakstone" milk was delivered on a Sheffield truck (R. 290). She said:

> "I got a rebate from Breakstone. Somebody from Sheffields comes and pays me every month * * * it comes out to 9¢ a quart. That is, I get 3/4¢ rebate" (R. 290).

She then said:

> "I stopped buying from Grand View Dairy right after the summer; I cannot remember what month. *Breakstone gave me 35 cases of free milk.* I am buying three cases from Breakstone now (R. 291) * * *. I don't like Grand View. *Grand View did not give me any free milk.*"

Witness Lavender testified that he received a rebate from Sheffields of 3/4¢ per quart (R. 293). Receipt form

used by Sheffield employees when giving rebates is Defendants' Exhibit 6 (received in evidence, R. 293, printed R. 654). This receipt was filled out for Lavender to sign. He was busy at the time the money was paid him (R. 293), and neglected to sign the receipt. In addition, Sheffields furnished Lavender 13 quarts of milk, instead of 12 quarts to a case. This was equivalent to an additional rebate of 3/4¢ per quart (R. 293), making his cost only 8 1/4¢ per quart.

Applied to the Class 1 milk sold by Sheffields in the marketing area for October (43,662,117 pounds), Sheffield's competitive advantage in this respect alone, was equal to $.1861 per cwt. on its fluid sales. The amount of gain on the half million pounds of other unpriced milk reported by Sheffields in Classes 1 and 2-A, cannot be figured, but that there was some gain, cannot be doubted.

It will be borne in mind, **that only half of all milk utilized in Class 1 was sold in the wholesale market** (R. 557), **where price cutting and chiseling has prevailed.** Assuming that Sheffield's wholesale and retail business was divided on this basis, **it had a competitive advantage of $.3732 per cwt. on its wholesale business, or slightly more than 3/4¢ per quart. By selling at 9¢ per quart, it could make a little profit and drive its competitors, such as Jetter, out of business.**

Sheffields had other competitive advantages which will be referred to in the discussion of market service payments herein.

It may be argued that appellee, Jetter, has the same right as Sheffields to establish a business in New Jersey. This would, of course, require substantial capital and engagement in a new enterprise in another community.

However, that argument is fallacious. It is comparable to a statute providing that concerns doing business in more than one community, are exempted from taxation, or, contrariwise, that small concerns doing business in one locality only should be taxed double or actually forbidden to engage in business.

This is not a case where Sheffields applies profits made in another community to undersell and eliminate Jetter and others in ruthless competition. **Here, the Order, by its terms, as interpreted by the Secretary, is used by Sheffields to reduce the uniform price paid its producers for milk sold in the area, almost at will.** The actual price paid to producers bore no true relation to the uniform price announced by the Administrator.

Sheffields did (in October) not pay its producers $1.91 for milk sold in New York City. It paid them $1.87 without regard to where it was sold.

Had the Order provided that milk sold in New Jersey should be accounted into the pool at its actual value, and had it been honestly so accounted, the Sheffield Company would not have had the competitive advantage above referred to. Should this Order be sustained, there is nothing to prevent the three large companies, Bordens, Sheffields and the Dairymen's League from destroying their competitors within a very limited period of time.

C. Competitive Advantages Under Article VII, Section 1, to Co-operative Distributors Operating in Other Markets.

Paragraph 47, stipulation of agreed facts in evidence (printed R. 262), states:

> *"The Dairymen's League occupies a dual capacity as a co-operative agent of producers and as a distributor. The Dairymen's League as a distributor sells milk in competition with the defendant Jetter and other distributors including distributors purchasing their supplies from it, and is a factor in the price which defendant Jetter and their competing dealers can demand and procure for fluid milk."*

The League handled 34% of all the milk sold in the area (Par. 48, Stip. Facts, R. 262). In addition, it sold milk in the State of New Jersey and in other markets. Its New Jersey sales for the months of September, October and November, and the effect thereof in reducing

cost of milk sold in the Metropolitan Area, was the subject of Finding No. 39 (R. 136, 137), which was as follows:

"39. The amount by which the price actually paid for Class 1 milk sold in the marketing area was reduced by 'blending' proceeds of New Jersey milk with proceeds of New York milk, as applied generally to the Dairymen's League, was as follows:

	Total volume sold in New Jersey	Difference between New Jersey price and price paid producers
	Pounds	
Sept.	10,208,500	$103,105
Oct.	10,457,153	99,342
Nov.	10,143,275	76,074

"The Dairymen's League, as a distributor, was engaged only in the wholesale or dealer-to-store and dealer-to-institutions trade. Total sales reported by the Dairymen's League of Class 1 milk sold in the marketing area, included its own wholesale business and amounts of Class 1 milk furnished to the Borden Company, delivered to its own stations and milk sold to other distributors. The following is a statement of the total amounts of milk utilized by the League in its own wholesale trade; the total amount of milk sold by it in Class 1, including amounts handled by Bordens, other dealers, and the League in its own distributing business, and a statement by which the Class 1 price would be reduced by applying the difference between the actual value of milk sold in New Jersey and the total actual price paid therefor to producers by the League:

	Total amount of milk sold by Dairymen's League in Class 1, including other dealers	Gain on New Jersey milk applied to all sales class 1 milk sold to dealers and in own business, in area
	Pounds	Per hundredweight
September	61,553,968	$ .1674
October	71,137,678	.1396

	Total sales by League in marketing area in its own wholesale business	Gain on New Jersey milk applied to all class 1 milk sold by League in its own wholesale business
	Pounds	Per hundredweight
September	11,292,149	$0.9130
October	12,236,083	.8118
November	10,692,420	.7114"

Possibly, the League passed some of this gain on to Bordens. The proportion so given up to Bordens, if any, does not appear in the record. Assuming that the money was divided pro rata with Bordens, the League still had a substantial competitive advantage on all fluid milk handled by it. If it retained these benefits for itself, it had an advantage ranging from $.7114 to $.9130 per cwt. on all milk sold in its own business during the first three months the Order was operating.

While the appellant argues on page 51 of its brief, that the League had lost 14% of its business through price cutting raids on its business by others, the evidence showed a steady daily increase in League sales of fluid milk in each of the three months. These things are shown in Findings numbered 35 and 36 (R. 135, 136), as follows:

> "35. The number of approved producers included in Dairymen's League membership was in August 1938, upwards of 19,500.
>
> "Reports to the Market Administrator, show that total utilization of milk in the marketing area by all handlers, was as follows:

	For month	Per day
	Pounds	Pounds
September	203,478,066	6,782,602
October	211,946,396	6,836,980
November	204,742,307	6,824,743

> "36. The Dairymen's League, which has receiving stations approved for the Metropolitan Area, and also for the State of New Jersey, and various lo-

calities therein, reported a total utilization of milk in Class I in the marketing area, as follows (Exhibits 11-12-54):

	Total for month	Total per day
	Pounds	Pounds
September	61,553,968	2,051,798
October	71,137,678	2,294,763
November	70,033,283	2,334,427

Gain per day October over September, 242,965 pounds; November over October, 39,664 pounds.

	Total unpriced Class I milk reported to producers, Exhibits 11, 12, 54	Total unpriced milk sold in New Jersey, Exhibit 81	Total unpriced milk reported sold in markets other than New Jersey
Sept.	35,586,543	10,208,500	4,624,717
Oct.	36,619,930	10,457,153	3,737,578
Nov.	35,374,845	10,143,275	"

It will be noted from the foregoing table, that its "unpriced" milk sold in New Jersey, was less than 1/3 of all "unpriced" milk reported by the League. The report of the Joint Legislative Committee to investigate Milk Control (Legislative Document [1937] No. 81), referred to elsewhere herein, and which constituted part of Exhibit A-3 to the stipulation, on Page 17 of the Report, compared the condition of up-state markets with those of the Metropolitan Area. The Report said:

> "The situation up-state is entirely different. This market is not troubled with the cut-throat competition and interstate milk. The Milk Control Law has operated very favorably in this area."

It is readily apparent that the League enjoyed an even greater advantage than Sheffields in the handling of "unpriced" milk.

ing program followed by Sheffields and others, whereby they partially exempted themselves from payment of prices fixed in the Order for fluid milk.

It is unlikely that Congress intended to allow any such exemption, or to permit such discrimination between proprietary handlers. While it is not forbidden, neither is it expressly permitted. However, the decision of Judge Cooper rested on the discriminatory character of Article VII, Section 1, and the construction thereof by the Secretary, which permitted, and by inference, approved the competitive advantages thereby obtained. The decision rests upon discrimination permitted (and practiced) which tended to drive appellee Jetter and others in a like situation, out of business.

Contrary to the Order, the provisions of Section 8c (5) (E) expressly regulate co-operatives, such as the Dairymen's League, with reference to their out-of-market milk. The statute says:

> "(F) Nothing contained in this subsection (5) is intended or shall be construed to prevent a cooperative marketing association qualified under the provisions of the Act of Congress of February 18, 1922, as amended (Code, Title 7, Secs. 291, 292), known as the 'Capper-Volstead Act,' engaged in making collective sales or marketing of milk or its products for the producers thereof, from blending the net proceeds of all of its sales in all markets in all use classifications, and making distribution thereof to its producers in accordance with the contract between the association and its producers: *Provided, That it shall not sell milk or its products to any handler for use or consumption in any market at prices less than the prices fixed pursuant to paragraph (A) of this subsection (5) for such milk.*" (Emphasis supplied.)

Accordingly, the provisions of Article VII, Section 1, are unauthorized, and forbidden, by the Act, insofar as the same apply to blending of "unpriced" milk (milk sold in other markets), by co-operatives.

D. Competitive Advantages Under Article VII, Section 5, to Co-operative Distributors.

Article VII, Section 5, of the Order provides:

"Sec. 5. Payments to Co-operative Associations. —Any co-operative association of producers may apply to the Secretary for a determination of its qualifications to receive payments pursuant to this section *by reason of its having and exercising full authority in the sale of the milk of its members, using its best efforts to supply, in times of short supply, Class I milk to the marketing area and to secure utilization of milk, in times of long supply, in a manner to assure the greatest possible returns to all producers, and having its entire activities under the control of its members.* After such determination, the co-operative association of producers shall be entitled to continue to receive such payment until it has been disqualified by the Secretary, after hearing, for failure to exercise the authority and to perform the functions upon which such determination was based.

"The market administrator shall make the payments authorized by this section, or issue credit therefor, out of the producer settlement fund on or before the 25th day of each month, subject to verification of the reports upon which such payment is based. Such payments shall be made to each co-operative association of producers under the following conditions and at the following rates:

"1. One cent per hundredweight of net pooled milk at any handler's plant which was caused to be delivered from its members by such association and on which such handler has made the reports and payments required by this Order.

"2. Except as set forth in paragraph 3 of this section, 2½ cents per hundredweight of net pooled milk at plants of other handlers which was reported and collected for by such association.

"3. Five cents per hundredweight of net pooled milk at plants operated by such association and, if, in addition to the other qualifications, such association has been determined by the Secretary to have sufficient plant capacity to receive all the

milk of producers who are members and to be willing and able to receive milk from producers not members, 5 cents per hundredweight of any net pooled milk which was caused by it to be delivered to any other handler and which is reported and collected for by such association."

We are here chiefly concerned with payments to co-operatives which are city milk dealers or distributors. So far as is disclosed in the record, the Dairymen's League is the only such in the area, unless appellee, Central Co-operative (which has not applied for the payments), may be classed in that category.

We do not find any provision of the Act authorizing these payments. Judge Cooper, in his opinion, expressed doubt on the subject, saying:

> *"The defendants make some further contentions, which may be briefly considered. It is urged that no provision of the statute authorizes Articles VII, Sections 5 and 6, of the order.*
>
> "These relate to payments of 5¢ per cwt. to co-operatives and market services of 23 cents per cwt. and transportation charges, both to co-operatives and proprietary handlers.
>
> *"The court does not find any sections of the act which clearly and definitely authorize such payments. If there be none, the order does not comply with the statute and should not be enforced"* (R. 772). (Emphasis supplied.)

The Dairymen's League, from the first, was "determined to be qualified" to receive payments under Subdivision 3. Thereby it received a subsidy of 5¢ per cwt. on all milk received at its own plants. **In addition, it received a subsidy of 5¢ per cwt. on all milk delivered to Bordens, which operates 65 milk receiving stations, receiving milk from 8,404 producers** (R. 135).

So far as the record discloses, **the League was the only co-operative "qualified" to receive payments for milk delivered to plants of proprietary handlers.** A few other co-operatives were qualified to receive payments under Section 5.

That the regulation was designed for the principal benefit of the League, is shown by the fact that in *September, out of $66,374.80* paid to co-operatives, *the League received $59,455.59; Sheffield Producers, $5,949.88; while all other co-operatives combined received only $969.33.* Payments made under Article VII, Section 5, and their distribution, are set forth in paragraph 40 of the Findings (R. 137), as follows:

> "40. The Administrator paid to co-operatives under the provisions of Article VII, Section 5, the sums hereinafter stated, which are divided into total payments, payments to Dairymen's League, and payments to other co-operatives:

	Total Payments to Co-operatives	Paid Dairymen's League	Sheffield Producers	Paid to other Co-operatives
September	$66,374.80	$59,455.59	$5,949.88	$ 969.33
October	70,062.29	60,794.07	5,894.88	3,372.34
November	71,805.51	57,280.32	4,824.50	9,700.69"

The competitive advantage applied to fluid milk, enjoyed by the League by payments under Article VII, Section 5, are set forth in the 41st Finding (R. 138), as follows:

> "41. The amounts received by the Dairymen's League under Article VII, Section 5, when applied to all milk sold by it in Class 1, including sales to Bordens and other dealers, and when applied only to milk sold by it in its own business as distributor, were as follows:

	Applied to all milk	Applied to own distributing business
	Per hundredweight	Per hundredweight
September	$0.0965	$0.5265
October	.0868	.4969
November	.0817	.5357"

Appellant seeks to justify these payments (pp. 154, 156

and 157 of its brief). It is argued that co-operative associations should be compensated,

> "for the expenses which they incur in conducting their operations so as to supply Class 1 milk in the marketing area in times of short supply, and to secure utilization of milk in times of long supply in such a manner as to assure the greatest possible returns as to all producers."

This follows the language of the statute, but the argument is not only unsupported by evidence, but contrary to the facts.

Obviously, a co-operative has no greater expense in supplying Class 1 milk when the supply is short, than at other times. As anyone knows, when the demand is greater than the supply a higher price may be, and is, obtained. The many tables of prices received for milk in past years show that higher prices are always received in periods of short supply.

What things are done by a co-operative, that are not done by proprietary handlers, such as Jetter? Both seek to increase their supply of milk. The co-operative, in theory, is a non-profit corporation. It charges nothing for services—only its actual expenses. Why should other proprietary handlers pay one of their chief competitors, a subsidy of 5¢ on all milk handled by that competitor?

If, indeed, the League sells all milk of its members (which we will discuss later), that does not imply any more expense or special service than is rendered by proprietary handlers. Jetter has to pay for coal, supplies, taxes, help and all other items in operating its receiving plants, that the League spends for similar items. No evidence was introduced to show any additional expense.

Witness Rubenfeld, owner of several milk companies, and one of the few beneficiaries of "unpriced" milk, outside of the League, Bordens and Sheffields, testified un-

der examination by Mr. McCarthy, that the diversion of milk with the market service payments, permitted him to take his surplus milk to a cream cheese manufacturer. Thereby, he could take care of sufficient surplus to insure fluid milk requirements the year round; could keep the surplus off the market (R. 355, 356). He said (R. 356):

> "With reference to this milk which was diverted to the cheese factory at Goshen, if I had to ship that milk from Kyserike, New York, and sold it in New York as fluid milk at a loss, the chances are I would not have shipped it to New York. I would have refused to take milk from the producer."

Here was a proprietary dealer, testifying concerning his operations at a fluid plant only. He shipped his surplus milk to a cheese factory. This is what Jetter would have to do with his surplus, under the theory of supplying the market in the short season. It is what the Dairymen's League would have to do, except that it may have operated its own cheese factory.

It will be borne in mind that money was to be made on all manufactured products. The prices charged were supposedly based on the market price of commodities. Actually the price fixed under the order for milk manufactured into cheese, was at least 20¢ per cwt. below its actual market value at all times (see testimony of witness Mills, R. 305). The League, as a manufacturer, benefited by this. In addition, the League got its Market Service Payment of 23¢ per cwt., plus trucking charges, from its fluid plants to those equipped for manufacture. The League manufacturing plants were also fluid plants, and the League could, and no doubt did, ship fluid milk from manufacturing plants, and replace it with milk from its fluid plants, in order to get the additional 23¢ per cwt. Actually, therefore, the League could (and did) utilize its surplus at a competitive advantage of 43¢ per cwt.

It is ironical that other producers and proprietary

handlers are paying the League 5¢ per cwt. on all milk received by it and on all milk received by Bordens as a subsidy for handling this surplus milk, which was already a source of considerable competitive advantage to the League.

(The League, in accounting to the pool, received credits in the producers' settlement fund to net it the uniform price, in addition to the advantage of 43¢ per cwt., which it enjoyed.)

It is also urged that the League should have the 5¢ per cwt., and an additional 30¢ per cwt. on certain milk under Article VII, Section 6, to compensate it for its "losses" on milk from its manufacturing plants, sold in fluid form in the short season. Appellant says in its brief at page 160:

> *"A co-operative which qualifies under Section 5 obligates itself to supply all its milk to the marketing area as Class 1 milk during times of short supply, even though this involves some disruption of its operations and* added expense as would happen, for example, if a co-operative association having its plant equipped for making condensed milk, *and having a favorable market for the sale of this product should suspend the manufacture of condensed milk in order to augment the supply of Class 1 milk in the marketing area."*

Here we have the argument that the Dairymen's League (for no other co-operative comes within this category), **has such a profitable operation in condensed milk, that it can ill afford to sell its milk in fluid form at a much higher price.** Immediately following this argument, the appellant urges that while it would be even more "profitable" to utilize surplus milk in the lower classes, it had an

> "obligation * * * to utilize surplus milk in the higher manufacturing classes in order to increase the return to producers even though * * * it would be more profitable * * * to utilize milk in one of the lower manufacturing classes."

This is inconsistent. If the co-operative was a proprietary handler, operating for profit, it would, of course, as Bordens, Sheffields and Rubenfeld do, make a large profit out of manufacturing surplus milk. **These profits (and the sale of unpriced milk in New Jersey), enable Mr. Rubenfeld to stay in business at a profit** (R. 357), **although he lost 1/2¢ per quart, or $60 a day, on his fluid operations in New York City during October, and he expected his losses to be greater in November** (R. 357).

Appellant urges:

> 1. It was more *"Profitable"* for the League to *manufacture milk at the lowest price brackets.*
>
> 2. It owed a duty to *manufacture in the higher brackets* (as condensed milk, etc.), *in order to return producers more money.*
>
> 3. It is assumed *to operate at a loss in selling milk in the highest bracket* as fluid milk, *even though it gets a bonus on that milk of 30¢ per cwt.* under Section 6.

This argument does not make sense. On page 157, the Government argues that the Jetter Dairy Company had manufacturing facilities at Solsville, and that the other appellees, Schuyler Junction and Rock Royal, could have utilized Jetter's manufacturing facilities. The brief states:

> "If any of the appellees had so desired they might have moved any milk that could not readily be sold as fluid in the marketing area to the Solsville plant of the Jetter Dairy Company, where it could have been converted to cream" (p. 157).

No provision in the Order permits Jetter to receive any bonus or subsidy for maintaining those manufacturing operations, nor does there appear to be any subsidy to the cheese factory, to which Rubenfeld shipped his milk at Goshen (R. 355). Nor does any other proprietary handler get the sudsidy. **And it is discretionary with the secretary as to whether other co-operatives get it.**

Appellant next argues "the payments are simply one

feature of the distribution of the burden of the surplus milk among all producers." *This argument defeats itself. Equalization is supposed to have accomplished this purpose. Part of the moneys, in theory paid to producers having a fluid market, is taken to increase the returns of all other less fortunate producers to the uniform price.*

Appellees, Rock Royal and Schuyler Junction, do not receive these co-operative payments, any more than they were allowed to vote their members in the referendum. Rock Royal made application for the payments, but no action was taken on its application up to the time of trial, four months after the Order was in effect (R.....).

It is argued that the Jetter Dairy Company cannot complain; that these payments to the Dairymen's League and a few others "do not effect the price which the appellee, Jetter Dairy Company, Inc., must pay for its milk." The appellant urges (p. 156):

> "The fact that these payments *may inure to the benefit of the co-operative association which is a competitor of this appellee*, in some of its operations, gives it no standing to complain of such payments * * * *they are paid out of moneys due to producers.*"

Unfortunately, *the co-operative payments do not go to the producers, as we will show hereafter. They are principally paid to the Dairymen's League, which is a dealer and a competitor of Jetter, and in part, at least, are passed back to storekeepers in unfair competition.*

These payments directly affect the Jetter Company as follows:

> 1. They are a part of the higher price exacted from Jetter for milk, than its competitors are required to pay.
>
> 2. The excess payment charged Jetter is used by the League and others in a like situation, if any, to capture Jetter's trade, and to reduce the price received for such milk as he sells.

The argument that all dealers are charged the same price for milk is pure bunk.

The price required *to be accounted into the pool* is *fixed* as to all handlers, *to the extent of milk sold in the marketing area.*

The price to be paid by handlers to producers is not fixed (except proprietary handlers such as Jetter).

The cost of milk to a handler, is the total of payments to the producer and into the pool.

The intent of Congress was that all dealers should be charged the same. The statute itself, Section 8c (5) (A) provides for the

> "fixing * * * minimum prices * * * *which all handlers shall pay.* * * * *Such prices shall be uniform as to all handlers,* subject only to adjustments for (1) volume, market and production differentials customarily applied by the handlers subject to such order, (2) the grade or quality of the milk purchased, and (3) the location at which delivery of such milk, or any use classification thereof, is made as to such handler."

There is no authority in the Statute for the Payment to Co-operatives under Article VII, Section 5.

Jetter is entitled to pay the same minimum price for milk as any other handler. However, he is required to pay a higher price than the handlers controlling 70% of all the milk sold in the area. The subsidy of 5¢ per cwt. to the League comes out of the total price which Jetter and others pay.

The Government argues on pages 156 and 157:

> "The co-operative payments are paid out of moneys due to producers; these payments do not affect the cost to appellee Jetter, of its milk."

This argument is unfair and untrue. The 5¢ subsidy *is not used in the equalization fund to enhance the price of producers whose milk is manufactured, nor to permit payment to them of the uniform price.* It is a direct subsidy to the Dairymen's League and other co-operatives receiving the same. Jetter is only obligated by the statute

to pay the same minimum prices charged other dealers, including the League.

Equalization provides payment to the Dairymen's League from the Producer Settlement Fund, of moneys to make up its deficit, if any, in funds necessary to pay its producers the uniform price.

Yet, the League is not obligated to pay its producers any fixed return for milk. It has no obligation to pay, as part of the cost of its milk, a subsidy to a competing dealer. It is not a producer and occupies no actual status other than as a distributor, such as Jetter and others in a like situation.

Finding No. 19 (R. 132) is as follows:

> "19. Milk dealers, licensed as such, under the provisions of Section 253 and 257 of the Agriculture and Markets Law of the State of New York, alone, have the right to engage in the purchase and sale of milk in said Marketing Area, and the term 'milk dealer' includes
>
> > "'Any person who purchases or handles or sells milk, including * * * co-operative corporations and unincorporated co-operative associations.'"

A "dealer" who handles milk received at an approved plant is a handler within the meaning of the Order.

This includes the Dairymen's League.

Its status was determined in the case of *People v. Shoemaker*, 228 A. D. (N. Y.) 314, affirmed 254 N. Y. 567, in which it was held

> "said Association, by virtue of its method of conducting business and the provisions of Section 69 of the Co-operative Corporations Law, is itself a purchaser of milk and does not act as agent for the producers."

Its contract with its producers, discussed in the Federal Trade Commission Report, and by the Dairymen's League in its brief herein, is printed as Appendix A to

this brief. It will be noted that nowhere in the contract does the League agree that it will take the milk of any producer. The contract is all in favor of the League. The provisions of the contract provide:

"Par. 1. The producer appoints the Association as agent, and grants it full power and authority to sell his milk in fluid or manufactured form.

"Par. 2. The producer forfeits to the Association, $10.00 a cow for all of his cows and $3.00 per cow per month, as a penalty in case of breach of the agreement by the producer.

"Par. 3. The producer agrees to comply with the rules of the Health Authority and, if required to manufacture his own milk, must be clean in such manufacture.

"Par. 4. Producer agrees to 'endeavor' to follow instructions of the Association as to proportionate quantities of milk produced during several months of the year.

"Par. 5. This provision deals with a situation in case the League either fails to sell or refuse to accept producer's milk at its plants. The Section provides '5. It is further agreed that in case the Association fails to sell the milk of the Producer as herein stated, that the Producer will in each and every case manufacture such milk into such products as he may desire and deliver said manufactured product to the Association upon its order for sale, or if directed by the Association, will deliver such milk at such station or manufacturing plant as said Association may direct.'

"Par. 6. Producer has a right to give away or retain milk for his own use, but cannot sell to anyone else except where the milk is rejected by the League, or upon its written consent.

"Par. 7. The producer agrees to turn over to the League, any offers made to him to purchase his milk at prices higher than those paid by the League.

"Par. 8. The producer is to loan money to the

League and shall receive therefor, a Certificate of Indebtedness, to be retired at the rate of 1/5 each year.

"Par. 9. Producer agrees to equalization and payments to him at a blended price 'subject to such equitable differentials *as said association* may from time to time establish. Producer consents that the Association shall deduct certain moneys to meet expenses already incurred, together with such other sums as may be necessary to cover interest, overhead, depreciation, guaranties and all such other expenses as may be reasonably estimated as essential to be incurred by the Association in conducting its operations, for which no certificates are to be issued.'[1]

"Par. 10. Producer agrees to further deductions 'to create a special fund to retire loans, build warehouses or other buildings; to purchase land and buildings, equipment, etc., and to provide working capital.' For this, certificates of indebtedness, payable at not to exceed 10 years and one month from date, with interest of not less than 4% is to be delivered to the producer.

"Par. 11. Producer consents to the establishment of differentials and to the manner of distribution of moneys in the blended price, stating that the Association 'is hereby appointed by the producer sole arbitrator of the distribution of such sums, and such distributions when so made shall be final and conclusive and binding upon the party.' Producer in the absence of fraud, 'waives all its rights in law or in equity to an accounting thereof, and this contract shall act as a bar in any proceeding taken by the producer therefor.'

"Par. 12. Distribution of the approximate blended price shall be made to producers on or before the 25th of each month, and final settlement shall be made after the close of the fiscal year, on the basis determined by the League.

"Par. 13. Producer authorizes the association to borrow money in its name and to pledge all

1 It will be noted that these are the same expenses which would be incurred by a proprietary handler.

unsold milk and dairy products, accounts receivable, notes receivable and trade acceptances in which the producer has any interest, as owner or otherwise, as security for such loans.

"Par. 14. Producer authorizes deduction of $1.00 for subscription to the Dairymen's League News.

"Par. 15. Producer agrees to execute an order directing other dealers to whom his milk may be sold (as Bordens) to pay the proceeds thereof, to the Association.

"Par. 16. The producer applies for membership in the Association, said membership to terminate if the producer cancels his contract.

"Par. 17. Contract can be cancelled during the 16-day period between the 12th and 28th day of February each year, effective April 1st."

It will be seen that the League does not commit itself to take the milk of any producer; to sell it at the best price obtainable; or indeed, to do anything except to distribute such amount as it pleases to the producer on the 25th day of any month for milk delivered the preceding month.

The producer has no right to any accounting.

He has no voice in the amounts to be deducted from his checks.

His money is handled by the directors. He is unschooled in law or corporate matters, such as his rights under the By-Laws, whatever they may be. He just agrees to abide by them.

The directors who have control of the vast sums of money received for his and other producers' milk, have the inside track. The producer waives his right to an accounting unless he can prove fraud. He is the helpless victim of the directors of this giant distributor, which in most instances, controls the only outlet for his milk.

He has no access to information as to the dealings

between the League and Bordens. Report of the Federal Trade Commission, part of Exhibit A-3, page 50 says:

> "Numerous charges have been made to the effect that there is an arrangement or a working relationship between The Borden Co. and Dairymen's League Co-operative Association, Inc., whereby The Borden Co. exercises an influence over the activities of the league, which may amount to a combination in restraint of trade."

On page 56 of the Report, the Commission said:

> "* * * No evidence *was found* indicating that there was any special arrangement between the two organizations whereby The Borden Co. received any concessions not shown in this report. *Insofar as this examination disclosed,* relations between Dairymen's League and The Borden Co. were that of vendor and vendee and no evidence was adduced showing the exercise of any control by The Borden Co. over the League."

What are the relations of the League with Bordens under the Order? The League was a party plaintiff to this action. It was there to disprove appellees' charges of monopoly and discrimination; to explain, if it could, what was done with the special payments of $285,000.00 which it received from the Producer Settlement Fund for the months of September and October alone (R. 137-138). It apparently did not pay these sums to its producers as they were paid at least 10¢ per cwt. less than the uniform price in each of those months (Certificates of Indebtedness considered as cash).

It did not explain what it did with the tremendous competitive advantage realized by not accounting its unpriced fluid milk into the Pool. It may be argued that milk brought less in other areas, but we have already shown that milk in other areas, brought higher prices.

By its settlement with the equalization fund, it was allowed the uniform price on all of its milk reported. This was exclusive of its three-fold competitive advantages of unpriced milk, co-operative payments and market service payments.

No evidence was offered by the League to show extraordinary expenses, or any expenses.

The appellees on the trial, stipulated all of the facts in the Government's case. The Government stipulated many facts of the appellees' case.

On the trial four weeks of time was spent; more than 2300 pages of testimony were taken. The testimony of witnesses, in narrative form, occupies only pages 274 to 396 of the printed record, totalling 122 pages. The larger portion of the 2300 pages of typewritten transcript, other than the testimony in the narrative statement, was devoted to extended harangues, repetitious argument and personal attacks upon counsel for appellees, by the attorneys representing the League and Bargaining Agency. It was comparable to a filibuster in the United States Senate. It delayed the trial until, as the typewritten record discloses, upon the insistence by the Government, the defendants rested their case, without having completed all the testimony which they deemed relevant. Witnesses were kept in court for days, while counsel for the League and Bargaining Agency harangued the Court, and were then sent home without having testified.

It is now urged that appellee Jetter has no standing. The money he pays "goes to producers." We repeat, any such argument is unfair and untrue.

Judge Cooper's opinion is a sweeping repudiation of the discriminatory form of the Order, and the unconscionable use to which it has been put by the League.

When producers are paid, only Jetter and proprietary handlers in a like situation, pay the fixed uniform price which is part of the total cost of their milk.

The Sheffield Company pays less than the uniform price, by blending, and its actual cost for fluid milk is still further reduced by competitive advantages on unpriced milk. We pointed out that in October, this amounted to upwards of $81,257.86. This applied to the

total fluid milk sold by Sheffields in the Metropolitan Area of 43,662,117 pounds (Ex. 43, R. 673), reduced the price of fluid milk $.1861 on all its fluid sales. If Sheffields sold half of its milk wholesale, its cost was reduced by twice that amount, or $.3732 per cwt. Since it, with Bordens, sells the greater part of all milk distributed retail to houses, its percentage of wholesale trade was probably less than 50% and its competitive advantage was thereby much greater than the figures given.

The League pays still less. This will be discussed later.

E. Competitive Advantages Under Article VII, Section 6, to Large Distributors, Whether Co-operative or Proprietary.

Article VII, Section 6, in substance provides for two classes of "market service" payments to handlers as follows:

1. For milk received at a shipping station and sent to a manufacturing plant for manufacture (except butter in months other than October) 23¢ per cwt. plus a hauling charge is allowed to the dealer originally purchasing the milk.

2. During November and December, certain condensing and drying plants receive 30¢ per cwt. on all milk sold in fluid form.

The apparent purpose of this provision is to help the handler, having only a fluid shipping plant, by paying him his receiving and transportation costs if he has to resell the milk to a manufacturing plant. An example of this is in evidence in the testimony of Rubenfeld, who shipped certain milk from his Kyserike fluid plant to a cheese factory in Goshen, which has already been discussed. *Where this provision is so applied, it might be slightly inequitable, but the appellees have no reason for complaint.*

However, in its practical application, it went further than taking care of handlers operating only fluid milk plants.

A concrete example is in another of Mr. Rubenfeld's operations. He operated two plants at Slate Hill, N. Y., about a city block from each other (R. 346). Instead of maintaining a separator in both plants, he transferred milk from one plant across the street to the other plant, and had it separated (R. 346). Under the Order, his transportation costs are paid out of the Producer Settlement Fund. In addition, he gets 23¢ per cwt. on the milk so separated, as a "service payment."

He also received similar payments of 23¢ for milk shipped from his Kyserike plant to Slate Hill to be separated (R. 343). Exhibit 28, not printed, shows one of these claims for service charges. The originals are filed and we do not have copies. However, Mr. Rubenfeld testified (R. 350) that he received $1201.75 service charges and $558.89 freight on milk transferred from Kyserike to Slate Hill to be separated in his own plant. *It is interesting to note that the Slate Hill Milk and Cream Company, one of Mr. Rubenfeld's companies, reported less than one-half of 1%, which was accountable to the Pool.* The plant is at Slate Hill, N. Y.; ships 99½% of its milk in fluid form out of the marketing area, as "unpriced" milk (R. 351). Nevertheless, the manufacturing facilities of the Company, in effect, netted Mr. Rubenfeld 23¢ per cwt. on most, if not all milk used by his other companies as fluid cream.

Another example is that of the Queensboro Company, one of the larger, if not the largest of the independent companies. It is engaged in manufacture of milk products, as well as the wholesale fluid milk business.

Mr. Samuel Miller, its president, was sworn as a witness (R. 310). The company operates a manufacturing plant at Canastota where milk is manufactured into cream, which is in turn sent to Syracuse for storage. On September 1st, the company had six or seven thousand tins of storage cream stored at the Syracuse Cold Storage Warehouse (R. 310, 311). The cream is reshipped to and standardized in New York City, by adding

milk to reduce the cream content (R. 311). The plant has a permit to ship fluid skim milk to New York City (R. 311). Queensboro has a plant at Indian Castle and other plants elsewhere (R. 310). It shipped milk from Indian Castle to Canastota to be separated into storage cream for which it paid $1.03 per cwt. It received 23¢ per cwt. market service charge, plus hauling from Indian Castle to Canastota (R. 318). It passed a Dairymen's League manufacturing plant en route (R. 318). This company sells 60% of its milk in fluid form in the short season, manufacturing 40%, and in the surplus season, manufacture 2/3, selling 1/3 fluid (R. 319).

It also shipped milk from its VanHornesville and Blossvale plants to Canastota and got the 23¢ per cwt. market service charge (R. 318). It shipped from its manufacturing plant at Canton to Canastota, but Miller said "they did not pay me for it" (R. 318). The Order did not permit this. Miller said "In New York City now, the competitive situation is a bad situation, very bad in the milk business" (R. 320). Queensboro accepted surplus milk from any other dealers when they had extra milk (R. 316 and elsewhere). This was profitable.

The Queensboro Company made claim for market service charges in September for $2[illegible]36.70 (Ex. 69, R. 735). All, or substantially all, of this amount was paid. The actual amount, we believe, is entered on the original Exhibit, but does not seem to be printed. Mr. Miller testified at (R. 317):

> "• • • *Competing dealers didn't stop chiseling after September 1 and neither did I. When they take my customers, I take theirs. That is the way for me to keep the business. About three weeks we didn't change the price and the trade just flitted away, and then we had to go and get the trade back.*
>
> "Q. *You laid low on chiseling for three weeks, is that right?* A. *That is right.*" (Emphasis supplied.)

Under cross examination by Mr. Wallach, he testified (R. 321):

"There has been chiseling in the milk business before September 1st and as long as I can remember. I remember 1929 chiseling. *Before September 1st and during the year 1938 I would get reports from our outside men that milk was sold by milk dealers to grocery stores at as low as two for seven cents a quart, sometimes lower than that. Since September 1st, 1938, the lowest price that I know of milk being sold to stores is around eight to eight and one-half cents per quart. That is about the lowest.*" (Emphasis supplied.)

He testified at (R. 322):

"Q. *And you say you laid low on chiseling in your concern for a few days, is that right?* A. *A few weeks.*" (Emphasis supplied.)

And at (R. 323):

"Q. *Did Berman (Queensboro employe) report how many cases of trade had been chiseled by you?* A. *I believe so.*

"Q. *How many cases did you chisel?* A. *We have got them marked down.*" (Emphasis supplied.)

At (R. 324), he said:

"After September 1, 1938, the market was only stabilized a few weeks. *It is not any better than it was a year ago, when there was no order, and I think it is worse lately. The last week or so, it got still worse.*"

* * * * * *

"When the Federal Order went into effect on September first, prices were stabilized generally throughout the market in the wholesale business for a period of two or three weeks. *Conditions in the market just now are worse than they were a year ago. The cost of milk is high, and the selling prices cheap. There is no present stabilization in the market.*" (Emphasis supplied.)

This witness and the witness Rubenfeld, who enjoyed competitive advantages under the Order, and apparently would like to see it continued, were unwilling witnesses.

An examination of their testimony in the original typewritten transcript will disclose this.

The League, of course, transported milk between its own plants to get the service charge. It offered no proof as to having shipped any milk to other plants, although it appears by the League News (R. 589) that it received diverted milk. It could receive market service payments only on its own milk. Judge Cooper found, Finding No. 42 (R. 138) as follows:

> "42. The Dairymen's League was paid by the Administrator under Article VII, Section 6 (1) for receiving milk which was moved to other plants for manufacture, 23¢ per cwt. plus certain mileage charges for transportation. These figures, broken down, are as follows:

	Total lbs. of milk	Total amount paid	Total allowance for receiving milk
September	28,374,541	$91,530.17	$65,261.44
October	22,920,087	73,994.62	52,716.20
November	(1)	6,228.27	(1)

(1) Note.—No records are available as to the pounds of milk on which market service payments were claimed, nor is there any information in the record as to whether manufacturing plants shipped fluid milk and received the 30¢ differentials provided for by Article VII, Section 6 (2)."

The Sheffield company was in a like position to divert milk between its own plants, and it may be fairly assumed that it shipped no milk to other companies. The market service payments it received, are shown in Exhibit 77 (R. 740). In September, Sheffields claimed forty odd thousand dollars, and received $38,225.96, in October it received $26,430.96, and in November $8,875.27. It will be borne in mind, that November and December are the two shortest months in the year. This appears in many places in reports contained in Exhibit A-3, and is referred to by the Government repeatedly in its brief. From February to September, Sheffields were in a position to realize much more than $38,000.00 monthly under this provision.

The vice of this "market service" provision is limited

to payments made to the three large companies, and one or two smaller ones by reason of manipulations of milk between their own plants. For bona fide surplus, sold by handlers without surplus facilities, the provision would benefit the industry and would not give any competitive advantage. These advantages, like the others, fitted the operations of the League, Bordens and Sheffield.

F. Discrimination in Favor of Co-operative Distributors by Exemption From Paying Producers the Uniform Price.

As we have repeatedly pointed out, this provision probably chiefly affects League operations. Through it however, the Borden Company, could benefit indirectly.

For instance, if the Borden Company bought direct from its producers, it would have to pay them $2.45 per cwt. for fluid milk utilized in the marketing area. Handlers purchasing from co-operatives operating plants, are obigated only to pay such co-operatives the base price. There is no need to reimburse such co-operatives for plant handling costs which are from 15¢ to 30¢ per cwt. The League can, under the Order, absorb these receiving station costs for Bordens. As to whether it does so or not, does not appear in the record. Such an inference may be drawn from the prices paid by the League to its producers. The League base price to farmers (considering certificates of indebtedness as equivalent to cash), in September, was $1.75 per cwt., and for October, was $1.81 per cwt. (Exhibits 11 and 12, R. 654-655). It operates a plant across the street from Jetter at Solsville, N. Y. These plants are beyond the 200-mile zone, so that the producers get 2¢ less than the base price. The price paid, included a "volume differential." Exhibit 82 is as follows (R. 742).

"Computation of the Actual Base Cash Return to Producers at Solsville, Oneida County, New York

	September	October
Base net cash return 3.5% (201-210)	1.60	1.76
Plus volume differential	.10	
	1.70	1.76
Minus freight	.02	.02
Actual net cash base return paid at Solsville	1.68	1.74
Plus certificate of indebtedness	.05	.05
Price paid at Solsville for 3.5% milk including certificate of indebtedness	1.73	1.79"

The uniform price for September was $1.87; Jetter was obligated to pay his producers, $1.85 per cwt., or 12¢ more than the Dairymen's League. For November, the uniform price was $1.91. Subtracting 2¢ freight differential, the uniform price at Solsville was $1.89. The Dairymen's League paid $1.79 in the same zone. So Jetter paid 10¢ per cwt. more to its producers. These underpayments gave the Dairymen's League, a competitive advantage in September of 12¢ per cwt. over Jetter and others in a like situation, and of 10¢ per cwt. in October. This was as to all Dairymen's League milk. When applied to its fluid milk sales, its competitive advantage is shown in Finding No. 43 (printed R. 138 and 139, and which is as follows):

> "43. Applying the base price paid by the Dairymen's League to the uniform price fixed by the Administrator (see Finding No. 39), shows payments by the League, less than the uniform price, as follows:

	All milk utilized in area	League price less	Total payments less than uniform price
	Pounds	per Hundredweight	
September	118,911,179	$0.12	$142,693
October	121,588,142	.10	121,588
November	114,560,639	.09	103,204

Payments less than the uniform price (paid on milk in the area only), when applied to all Class 1 milk sold by the League, including Bordens and other dealers, and when applied to sales in League's own distributing business, were as follows:

	Total amount	Applied to all milk	Applied to own business
		Per Hundredweight	
September	$142,693	$0.2318	$1.2636
October	121,588	.1709	.9936
November	103,204	.1473	.9652"

The combined competitive advantage to the Dairymen's League under the Order is shown in Finding No. 44 at (R. 139), as follows:

"44. Summarizing the total competitive advantage to the Dairymen's League from sales in New Jersey, payments under Article VII, Sections 5 and 6, Producer Settlement Fund, and by payment to producers for milk at less than the uniform price, the Dairymen's League had the following competitive advantages, as shown by the preceding tables:

Competitive advantage applied to all sales

	September	October	November
	Per hundredweight	Per hundredweight	Per hundredweight
N. J. Sales	$0.1674	$0.1396	$0.1086
Art. VII, Sec. 5	.0965	.0868	.0817
Art. VII, Sec. 6	.1060	.0741	(1)
By payment less than uniform price	.2318	.1709	.1473
	.6017	.4714	(2).3376

1 Note—No adequate data as to the amounts involved or on which payment was made for market service in November, is in evidence, nor any data as to whether the 30¢ differential under Article VII, Section 6 (2) was claimed or paid.

2 Note—November missing.

Competitive advantage if applied only to League Distributing Business

	September	October	November
	Per hundredweight	Per hundredweight	Per hundredweight
N. J. Sales	$0.9130	$0.8118	$0.7114
Art. VII, Sec. 5	.5265	.4969	.5357
Art. VII, Sec. 6	.5779	.4380	(1)
By payment less than uniform price	1.2636	.9936	.9652
	3.3010	2.7403	(2)2.2123

1 Note—No adequate data as to the amounts involved or on which payment was made for market service in November, is in evidence, nor any data as to whether the 30¢ differential under Article VII, Section 6 (2) was claimed or paid.

2 Note—November missing."

We have already pointed out that more than half of all fluid milk sold in New York, is sold wholesale. In September, total sales of milk in Class 1 were reported at 203,478,066 pounds (R. 135). Half of this, representing wholesale fluid milk, equals 101,739,033 pounds. The League in September, sold 11,292,149 pounds in its own wholesale distributing business, Finding No. 39 (R. 137). Accordingly, *the League as a distributor sold at least 11.09% of all wholesale milk sold in New York in September, the first month the Order was in effect. It sold comparable amounts in other months* (R. 137).

It will be seen that if the League applied all of its competitive advantage to its own wholesale business, that in September, that competitive advantage amounted to $3.35 per cwt. *In other words, the League would have the milk which it sold wholesale in its own distributing business, for nothing, and 85¢ per cwt. bonus left over.*

Part of this comes from the subsidies under Article VII, and part from unpriced milk, and underpayments to producers. In October, the competitive advantage was $2.74 per cwt. *Its milk would cost it nothing, and it would have 29¢ besides.* In November, with one figure missing, its advantage was $2.21 per cwt.

How could Jetter, and other proprietary handlers selling fluid milk wholly within the City of New York, compete with that situation? They could not. The *price* which *they paid* both to the administrator and the producers, *was fixed.*

G. The Order by It Arbitrary and Discriminatory Regulation, Deprives Appellees of Liberty and Property Without Due Process. It Takes Their Property for (an Alleged or) a Public Use and Transfers It to Others Without Just Compensation.

While appellee Jetter is a proprietary handler, and appellees Rock Royal and Schuyler Junction are co-operatives, the effect of the Order is to discriminate against both. We will take them up separately.

Jetter Dairy Company.

Any exaction from Jetter of a higher, total price for milk than that charged other handlers, constituted a taking of its property. It is true that only from the amount paid to the Producer Settlement Fund, was there an actual transfer of Jetter's money to its competitors, of whom the Dairymen's League, Bordens and Sheffields were the principal beneficiaries.

But Jetter's producers were not entitled to receive more than other producers. The intent of Congress, as expressed in the statute was that equalization in a market-wide pool, would treat all producers alike.

Moneys paid to the League from the contributions of Jetter to the Producer Settlement Fund enabled that competitor to sell milk at less than the cost to Jetter. Efficiency was no element.

The requirement that Jetter pay its producers more than his competing handlers paid, widened the gap between his total cost and the total cost to his competitors. It rendered him still more vulnerable to attack. Judge Cooper, in his opinion, illustrates the effect of the Order on Jetter's business. He says (R. 765, 766, 767):

> "Co-operatives which are also milk dealers or handlers, may and do pay their producers less than the uniform price and from their payments into the Producers Settlement Fund, if any, they receive payments back for services, which proprietary handlers cannot, and do not receive.
>
> In fact, there is very little that a proprietary handler, who does not sell any milk outside the marketing area, and who has no plant to which he can transfer surplus milk, can do to recoup his losses. He cannot reduce his price by "blending" a fictitious value on "unpriced" milk with that sold in the area. He has no unpriced milk. He has no manufacturing plant, and may possess neither capital or inclination to enter the manufacturing field already principally covered by Dairymen's League, Bordens, National, and some of the larger independents.

The discrimination between the small proprietary handlers and the Dairymen's League will be manifest from the following illustration of the comparative operation of the statute as applied in Order No. 27 as it affects the defendant, Jetter Dairy Company, and the Dairymen's League. The figures include all the differentials in favor of the co-operatives.

The loss per quart is from 1 to 1 1/2 cents per day for milk sold in the market area.

Jetter sells 40,000 quarts per day all in the marketing area, at a loss of $400.00 to $600.00 per day because required to pay the uniform price to producers.

The Dairymen's League sells about 1,640,000 quarts per day or 41 times as much as Jetter. Dairymen's League sells without loss, for what it does not gain from sales in New Jersey and other out-of-State markets, together with the service and other differentials, it may deduct from its producers because it is not required to pay the uniform price.

Jetter owes to Producers Settlement Fund for September and October (September payment has been made)	$ 30,000
Dairymen's League paid to Producers' Settlement Fund for September and October	110,000
or only about 3½ times as much as Jetter.	

Dairymen's League received from the Producers' Settlement Fund under Article VII, paragraph 5, in September $59,455.59, and in October $60,794.07, or a total of $120,239.66, which is about $10,000 more than it paid in.

In addition, it received from this fund under Article VII, section 6, in September $91,630 and in October $73,994, making a total of $165,524. Adding this to the aforesaid $120,239.00, it makes a grand total of $285,763.

This is about $175,000 more than the Dairymen's League paid into the Producers' Settlement Fund.

Jetter received nothing. Jetter loses at a $400.00 to $600.00 per day loss, on a 30-day month, $12,000 to $18,000. In a year that amounts to $144,000 to $216,000. One year's payments into the fund at $15,000 per month would be $180,000. In less than a year it is practically certain that all the assets of the Jetter Company would be taken by the operation of the order, and it would have no funds or assets to pay producers or to make further payments into the fund. In short, its entire property would be confiscated. This is by force of the statute as applied in the Order.

As a matter of fact, the defendant Jetter Company could not last a year. It had on April 1, 1938 only $50,000 capital and $30,000 surplus or a total of $80,000. The taking of its capital at the rate of only $15,000 per month would exhaust its entire assets within 6 months.

Moreover, there is nothing to prevent the Dairymen's League and other large producers from further depressing the price of milk sold in the marketing area in order to capture the customers of competitors and thus forcing the Jetter Dairy Company and others in like situation, out of business at an even more rapid rate.

The Dairymen's League Co-operation, however, could go on indefinitely for the statute and order are greatly discriminatory in favor of co-operatives, especially large ones, which can take advantage of all the opportunities it presents.

The property of the Jetter Company, and, of course, all other proprietary handlers and smaller co-operatives is thus taken by operation of statute and without the due process of law required by the Fifth Amendment.'' (Emphasis supplied.)

Rock Royal and Schuyler Junction Co-operatives.

Appellees, Rock Royal and Schuyler Junction are not equipped to profit by market service payments. They have not been allowed the payments to co-operatives permitted under Article VII, Section 5.

Other co-operatives in the same situation, are the Clin-

ton Co-operative (R. 378, 381) and Worcester Co-operative (R. 306), whose qualifications had not been "determined" by the Secretary, in order that they might receive payments under Article VII, Section 5.

As to appellees and others in a like situation, payments out of the Producer Settlement Fund *depressed the uniform price* and *increased their pool obligation.* They represented their producers in making sales of milk, and were damaged by payments out of their share of the fund, principally to the League, as well as by payments to Sheffield Producers Co-operative, and a very few others.

There is nothing in the record to show any reason for payments to the Sheffield Producers Association. The Sheffield Company paid that Association ½¢ per hundred on all milk purchased by it (R. 596). This payment by the company was of long standing (see Federal Trade Commission Report, House Document No. 95, part of Exhibit 3 to the Stipulation, page 96, which shows "Association dues, $.005"). Of this association, the Report said on page 98:

> "Sheffield Producers Co-operative Association is controlled by its only customer—Sheffield Farms Company, Inc."

Strange as it may seem, in the Stipulation of Agreed Facts in evidence (R. 261), we find the following statement:

> "UNLESS ALL MILK WHICH IS PRODUCED FOR SALE IN THE MARKETING AREA, IS SUBJECT TO THE SAME REGULATION, THE RESULT WILL BE DISCRIMINATION AGAINST THE MILK WHICH IS REGULATED."

This was introduced in evidence by appellant (R. 269). It bears out and confirms appellees' position in this regard. Its truth is self-evident.

H. The Provisions of Article VI, Section 8, Are Discriminatory as Against Appellees, Rock Royal and Schuyler Junction.

This section provides for payment of 20¢ per cwt. to certain producers in 17 counties and 12 towns in Ulster County. This payment to producers is a bonus or extra payment above the uniform (or other) price. Handlers paying the 20¢ to such producers, deduct the same from their pool obligation, and thereby the money so paid, is actually paid (withheld) from the Producer Settlement Fund.

Appellees' plants are both beyond the 200-mile zone. The eighteen preferred counties are nearer New York. Appellees are not allowed this 20¢ payment, and their payments into the equalization fund (pool obligation) are increased thereby, to appellees' substantial damage. It will be borne in mind that these producers' base payments are subject to the transportation differentials set forth in Article IV, Section 3.

Finding No. 50 (R. 142) on that subject is as follows:

> "50. By the provisions of Article VI, Section 8, handlers receiving milk in 18 counties therein enumerated, in making return to the Administrator, are permitted to deduct 20¢ per cwt. for all net pool milk received from producers at plants in said counties. Producers in said counties are paid 20¢ per cwt. more for all milk, than producers in other localities, including all producers delivering to the several defendants herein.
>
> "Accordingly, the price received by producers delivering to the three Co-operative defendants, is reduced by the increased amount of payments to producers in said 18 preferred counties, and in effect, moneys paid by handlers for milk of said defendant co-operatives, are in part expropriated to make such preferential payment to producers in the counties receiving such preferential payments."

Jetter's producers are also discriminated against. It is true that Jetter has no standing to raise this question, but it is proper for the Court to consider this fact since Jetter's producers are in a like situation with the Rock Royal and Schuyler Junction producers. Finding No. 51 (R. 142) on this subject, is as follows:

> "51. In effect, the uniform price return directed to be paid to producers delivering to the Jetter Dairy Company, is reduced by payment to producers in the 18 preferential counties, and moneys of said producers delivering to defendant Jetter, and other proprietary handlers, outside of said preferred counties, are expropriated to make payment to producers therein of payment of 20¢ per cwt. in excess of the uniform price."

The reason for this discrimination is not primarily to benefit the producers who receive this bonus or subsidy from producers delivering to all three appellees. It is to give Bordens, Sheffields and the League, additional competitive advantages in saving of freight. The freight differentials established by the Order, are discriminatory. This was established and is set forth in Finding No. 49 (Printed R. 141) as follows:

> "49. *Establishment of freight differentials was designed to make the base delivered cost of all milk to New York City the same.*
>
> "Milk delivered to New York by truck, in the various zones, cost the handler, according to zones, the actual freight, plus or minus freight differentials, according to whether the point of origin is less or more than 200 miles. Without reducing the schedules to each 10-mile unit, the net freight cost, after applying the differentials, in various typical zones, is as follows:

Zone	Actual freight	Differential	Total cost
25-mile	0.09	+0.13	0.22
50-mile	.115	+ .105	.225
100-mile	.165	+ .07	.235
150-mile	.215	+ .035	.25
200-mile	.265	.00	.265
240-mile	.305	— .02	.285
250-mile	.315	— .02	.295
300-mile	.365	— .045	.32
350-mile	.415	— .08	.335
400-mile	.465	— .09	.375
450-mile	.515	— .115	.40
500-mile	.565	— .14	.425

"The Jetter. Dairy Company, being in the 231-240 mile zone (actually 250 miles by highway), its total freight cost is 6½¢ more per cwt. than milk in the 25-mile zone. It is also higher than in any intermediate zone. Defendant, Schuyler Junction Co-operative's plant is at Schuyler Junction, N. Y., in the same zone; the plant of defendant, Rock Royal Co-operative is in the 176-180 mile zone, and the plants of the defendant Central Co-operative are principally beyond the 200-mile zone, so that the total delivered cost of said milk is greater than the delivered cost of upwards of —% of all milk sold in the area".

and in Finding No. 55 (R. 143) as follows:

"55. Handlers whose milk receiving stations are beyond the nearby freight zones, are at a disadvantage in selling milk, in that the base price of said milk delivered in New York, is increasingly high, as the handlers' receiving stations are at increasing distances from New York."

Exhibit 55 (not printed) discloses that most of the milk receiving stations in the favored 18 counties, are operated by the League, Bordens and Sheffields, or subsidiaries of National Dairy and Bordens (Sheffields is a subsidiary of National Dairy).

For instance, *in Columbia County, only Bordens and Sheffields have plants. In Dutchess County, only Bor-*

dens and Sheffields have plants; in Orange County, fluid milk receiving stations are mostly operated by Bordens and Sheffields, although there are several other stations, including Middletown Milk and Cream Company, and Slate Hill Milk and Cream Company, which are owned by witness Rubenfeld.

It is more profitable for the League, Bordens and Sheffields to ship their fluid milk requirements from these nearby counties because of savings in freight. High prices for milk, of course, lead to larger production by farmers. These companies profit by freight savings in proportion to the increased intake if any due to high prices, and in addition, plant handling costs are reduced by increased plant volume. Regardless of the motive back of this unfair and unwarranted preference, *the preference is unauthorized by the statute.* Section 8c (5) (B) (ii) of the Act, provides:

> "For the payment to all producers and associations of producers delivering milk to all handlers of uniform prices for all milk so delivered, irrespective of uses made of such milk by the individual handler to whom it is delivered."

The section then provides for payments of the usual differentials as to location (freight), grade, quality, volume, and market differentials.

These preferred producers have no more right to the fluid market in New York City than the appellees have. The purpose of the Order is to keep appellees from destructive competition. In theory, freight differentials are established so that Rock Royal milk can be delivered to a dealer in New York at the same delivered cost as Columbia County milk. Removal of the incentive to cut prices in order to capture a fluid milk outlet, is the purpose of the Order, and apparently the theory of it is, as stated in the Act, to provide

> *"for the payment to all producers • • • of uniform prices • • • irrespective of the uses made of such milk."* (Emphasis supplied.)

No data is available in the record to show actual volume of milk in the nearby counties, but Exhibit 3 to the stipulation (not printed) shows that in June and November, 1937, the following quantities of milk were produced in the nearby (New York State) zones:

Mileage zone	Amount of Milk handled June (388 plants)	November (365 plants)
	Pounds	Pounds
31- 80	28,891,000	25,450,000
81-130	40,292,000	25,589,000
131-180	74,827,000	29,991,000
Total	144,010,000	81,030,000

This includes only plants in the 8 counties in New York State. There is no data available as to the 10 counties in New Jersey, Connecticut and Massachusetts. However, it is fair to assume that *the plants in these 18 preferred counties are capable of supplying almost the entire fluid milk requirements of Bordens, League and Sheffields even in the shortest seasons of the year.*

I. Summary:

Finding No. 56 (R. 143) sums up nine of the discriminatory features of the Order, as follows:

> "56. By the terms and application of the Order, there is a differentiation between handlers who sell milk at wholesale and retail in the marketing area, and the prices required to be paid by said handlers for fluid milk, in the following particulars:
>
> "a. Co-operative handlers, who are also distributors, are under no requirement to pay any stated price for milk sold to stores and consumers.
>
> "b. The price accounted by co-operative handlers to the Producer Settlement Fund, is reduced by payments to them out of said Fund, pursuant to Article VII, Section 5.

"c. The large handlers, both co-operative and proprietary, being principally National Dairy subsidiaries, Borden's and subsidiaries, Dairymen's League and several smaller companies, including Queensboro Farm Products, Inc., and the several companies operated by Aaron J. Rubenfeld, which are engaged in manufacturing milk into milk products, receive so-called 'market service payments' under Article VII, Section 6, which are not and cannot be received by small handlers, who combine fluid milk operations with manufacturing on a small scale in their own plants, thereby, in effect, substantially reducing the prices paid by such large handlers for milk utilized in fluid form.

"d. Proprietary handlers purchasing direct from producers, are obliged to pay for the cost of maintenance and operation of milk receiving stations, and the cost of receiving milk, whereas handlers purchasing from co-operative associations, are required to pay only the base price for such milk. Such receiving station or plant handling costs are from 15¢ to 30¢ per cwt.

"e. By the terms and application of the Order, the same large handlers referred to in the next preceding paragraph, both proprietary and co-operative, in making payment for all milk purchased in the production area, are permitted to pay a blended price, which price is computed upon the prices fixed in the Order for milk sold in the marketing area, and with arbitrary prices fixed by such handlers as they see fit, for milk sold outside of the area, which milk is known as 'unpriced milk,' thereby, in effect, reducing the price paid by such handlers for fluid milk sold in the marketing area.

"None of the defendants are engaged in the manufacture of milk products. None of said defendants are engaged in marketing milk outside of the marketing area.

"f. National Dairy subsidiaries, including Sheffield Farms and the Borden Company, purchase milk from co-operatives. The Dairymen's League, which is also a distributor, is a co-operative. Said companies, by the reports filed with the Administrator, handle more than 50% of the fluid milk

sold in the area, and the greater part of milk sold out of the area.

"g. Handlers purchasing milk in areas producing milk of high butterfat content, pay a higher price for milk utilized in fluid form than handlers purchasing milk of less butterfat content, although the resale price of such milk in New York City, is neither greater nor lesser by reason of butterfat content.

"h. Handlers purchasing milk beyond the 25-mile zone, in each succeeding zone, pay a greater delivered cost for milk delivered to the marketing area, for the reason that the freight differentials established by the provisions of Article IV, Section 3, are not comparable to the actual difference in freight costs, said unfavorable difference increasing from ½¢ per cwt. in the 50-mile zone, to 22½¢ per cwt. in the 500-mile zone.

"i. Defendant Rock Royal's plant is in the 176-180-mile zone; the plants of the defendant Jetter and Schuyler Junction Co-operative, are in the 231-240-mile zone, and the several plants of the defendant Central Co-operative, are beyond the 200-mile zone."

J. The Competitive Advantages to Certain Handlers Were Employed Directly to Discriminate Against Appellees.

Appellant places much emphasis on the claim that appellee Jetter suffered no loss; that the cost of a quart of milk delivered at New York City, is not 9¾¢.

Finding No. 60, quotes the intervening plaintiff on the subject, as follows (R. 145):

"60. The Dairymen's League News, for May 17, 1938, Exhibit 24 in evidence, states 'Today, More than half of all milk sold in the Metropolitan district, is handled through stores.'

"*The absolute minimum delivered cost per quart of fluid milk delivered to stores in New York City, by handlers, based on the prices fixed in the Order, has been since September 1st, 1938, and now is, 9¾¢ per quart.*" (Emphasis supplied.)

The stipulated facts and evidence (R. 268) are to the same effect. No evidence to the contrary, was given. The League's statement that

> *"the absolute minimum delivered cost per quart * * * is 9¾¢ per quart."*

assumes efficient operation. "Absolute" minimum can imply nothing else.

The manner in which the competitive advantages were used is briefly stated in Findings Nos. 61 to 67 inclusive (R. 145, 146) as follows:

> "61. On September 1, 1938, a majority of the handlers selling Grade B milk in the dealer-to-store trade, raised the price of such milk to 9¾¢ per quart.
>
> "62. On September 1, 1938, the Jetter Dairy Company had been selling to one Weintraub, 30 cases of milk daily, at 9¾¢ per quart. *On September 4, 1938, intervening plaintiff, Dairymen's League, solicited said account, and by selling at 9¢ per quart, acquired 10 cases of said trade.* Gold Medal Farms, Inc., by same price cutting, as the League, on same day also acquired 10 cases of said trade. In order to retain the balance of 10 cases of such trade, Jetter Dairy Company was compelled to and did reduce its price to 9¢ per quart on September 5, 1938.
>
> "63. *Within two weeks after September 1st, milk was being sold generally in the dealer-to-store trade in the City of New York at from 8¢ to 9¢ per quart. The Sheffield Farms Company, in order to capture the trade of Herman Lavender, furnished said Lavender milk at 9¾¢ per quart; rebated to said Lavendar ¾¢ per quart on all purchases, and in addition thereto, delivered 13 quarts per case, the extra quart of milk further reducing the price ¾¢ per quart, making the net cost to said Lavender, 8¼¢ per quart.*
>
> "The Sheffield Company sold milk to one Rose Paley; gave her 35 cases of milk free, in order to induce her to buy 'Breakstone milk.' Prior to that time, the Dairymen's League had given the same

witness 35 cases of free milk to procure her to buy Dairymen's League milk. The Grandview Dairy Company refused to give Mrs. Paley any free milk, and she discontinued buying from them, obtaining her requirements from Sheffields and Dairymen's League, who made the concessions above referred to. Sheffields billed milk to Mrs. Paley at 9¾¢ per quart, collected that amount, and rebated to her in cash at the rate of ¾¢ per quart. The Dairymen's League charged her 9¢ per quart.

"64. The practices above referred to were general throughout the milk industry, and the capture of trade by price cutting is known as 'chiseling.'

"65. Certain producer dealers, with large number of cows, are not subject to the Order. The Balsam Dairy Company, selling milk in Brooklyn, sold milk to Israel Hock, a storekeeper, at 8½¢ per quart in September, 1938.

"66. It is common practice in the marketing area for storekeepers to buy milk from several dealers, varying the quantities purchased from each in accordance with the price concessions, free milk, or other concessions, which such storekeepers can obtain from one dealer as against another.

"67. *From September 1st, 1938, to January 1st, 1939, the Jetter Dairy Company lost 240 cases of daily trade to competitors by reason of concessions. It recaptured upwards of 40 cases of this trade,* but in doing so was obliged to give, in free milk, cream, and cash, several hundreds of dollars. In addition, said defendant sustained a loss on each quart of milk sold by it through the Jetter Dairy Company or the Triboro Milk & Cream Co., which sells milk received from producers delivering to the Jetter Dairy Company. In order to stop further losses of trade captured by competitors who undersold the Jetter Dairy Company and Triboro Milk & Cream Company, the said defendant was obliged to reduce the price of milk charged to all customers to prices ranging from 8¢ to 9¢ per quart, in order to meet such competition. The principal stockholders of Jetter Dairy Company and Triboro Milk & Cream Co. are identical." (Emphasis supplied.)

List of customers (known in the trade as "stops") lost by Jetter is contained in Plaintiff's Exhibit G (printed R. 651-653 incl.). Stops lost to the Sheffield Farms Company are designated "Breakstone." The Sheffield Company captured 12 customers, as follows (R. 651):

"Breakstone

504 E. 138 St., 5 cases, May.
572 E. 138 St., 4 cases, May.
785 E. 151 St., 2 cases, Nov.
542 Southern Boul., 2 cases, Sept.
167 St. Anns Ave., 3 cases, Sept.
715 Second Ave., 5 cases, Sept.
246 Columbus Ave., 2 cases, Nov.
1311 Brook Ave., 2 cases, Nov.
504 E. 174 St., 2 cases, Dec. 1.
879 Longwood Ave., 5 cases, Sept.
1425 Wilkins Ave., 3 cases, Nov."

Only one other, Adler, captured more.

In order to recapture 40 cases of trade or hold existing customers, Jetter had to make price concessions and give cash and free milk. This is the same practice indulged in by Sheffields, the League and others, as shown by witnesses Bronfeld, Paley, Lavender and Hock (R. 288-295, incl.). The concessions which Jetter had to give (through the Triboro branch of the business), are shown at (R. 653), and are as follows:

"Cost to Triboro

1938

1869 Third Ave., 30 cases, Dec.
800 Home St., $30.24.
1311 Brook, 25 cases, Nov. 28.
504 E. 138, 572 E. 138, 20 cases, 2 qt. HY, Oct. 22.
1642 Lexington, 30 cases, Nov. 14.
3805 Burg.
413 St. Anns, $100.
311 St. Anns, 34 cases, Oct. 22.
1265 Brook Ave.
1364 Washington Ave., 50 cases, Nov. 28.
328 E. 66 St., 20 cases, Nov. 14.

232 E. 108 St., 50 cases, Nov. 14.
613 E. 141, All 27.23.
222 E. 104, All in price.
167 St. Anns, 50 cases."

The Dairymen's League was the first to attack Jetter's business. It took a second customer away later on at 452 E. 146th Street (R. 394). The Sheffield Company was chiseling; Balsam Dairy Company, which was not subject to the Order, was chiseling. It was general. While widespread chiseling did not commence for about two weeks, the League and the Gold Medal Company were in the field without delay.

When Jetter's route manager, Rootstein was called as a witness, the appellee concealed nothing from the Court. Rootstein had with him, a statement of milk chiseled by other handlers than the League (Exhibit G, R. 651). He did not have the League stops which had been chiseled, for the reason that this information had been previously furnished for use in a motion herein (motion papers not printed).

A possible explanation of chiseling, by other dealers, is covered by Findings 57 and 58 (printed R. 144, 145), as follows:

> "57. The Market Administrator has no facilities for checking the actual disposition of milk reported by various handlers, nor for checking whether cream withdrawn from storage, is cream which was already in storage, or is cream delivered to the storage plant and immediately withdrawn. The size and complicated nature of utilization of milk by the large companies, their plant-to-plant transactions within their own business, and their in-market and out-of-market sales, make it impractical for the Administrator to check the accuracy of reported utilization, and disposition except from the books of such large handlers."

> "58. In the fierce competition for fluid milk business in the Metropolitan Area, hereinafter referred to, there is a strong incentive to manipulate milk between plants and in and out of the market by

> the large companies, having facilities so to do, for the purpose of obtaining a competitive advantage. Such large companies have made full use of such competitive advantage, in application of the Order to their businesses."

There was the incentive and opportunity for certain handlers, by dishonesty, to secure an unfair advantage.

Without accusing Queensboro, which concededly indulged in chiseling (R. 317) (having laid low for a few days), we illustrate how this might be accomplished. Queensboro received fluid milk at Indian Castle, Van Hornesville and Blossvale. This milk was shipped to Canastota (R. 318). If it utilized this milk in fluid form, it was obligated to pay $2.45 per cwt. If it utilized it in cream, it was obligated to pay $1.75 per cwt. in September, or $1.90 in October and November.

At Canastota it manufactured milk into cream (R. 311), reporting the same as "storage" cream, at $1.13 per cwt. (R. 315-671). Its market service payment of 23¢ reduced this price to 90¢.

Cream was being put in and taken out of storage with no checkup by the Administrator (R. 144).

Queensboro was reshipping this milk to New York (R. 311); it had a permit to ship fluid skim milk to New York City (R. 311). It could, conceivably, obtain skim milk from elsewhere.

There was nothing to prevent Queensboro from putting in and taking out of storage, the same cream at the same time, shipping the same to New York, adding the skim milk from which it had been extracted, or any other fresh skim milk, agitating the mixture, and thereby having fluid milk at 90¢ per cwt., plus some slight added cost of transportation. Or, it could ship the cream to New York and utilize it as fresh fluid cream. Its cost for milk from which the cream was made, would not be $1.75 or $1.90, but would be 90¢ per cwt.

It is noteworthy that Queensboro Farms captured six of Jetter's customers, as follows (R. 652):

"Queensboro Farms

781 Prospect Ave., 2 cases, June.
643 Wales, 6 cases.
3822 Broadway, 8 cases, 1937.
21 First Ave., 5 cases, Oct.
605 W. 158, 3 cases, Oct.
155 W. 135."

One customer was subsequently captured by Jetter from Queensboro (R. 653).

It may be argued that opportunity for dishonesty is no defense in this action. Very likely that is true. We refer to the matter, only as a possible explanation of how some dealers may be able to chisel and still stay in business.

This matter was the subject of discussion by Sheffield Producers at their November meeting. The minutes of Sheffield Producers meeting (R. 598) contain this statement:

> "The question of irregularities in the sale of fresh and storage cream during the month of September by some dealers, was considered."

In order to avoid the discriminatory provisions of the New York State Milk Control Law, the Joint Legislative Committee Report, heretofore referred to (Legislative Document, 1937, No. 81), on page 15, explains that *distributors increased their purchases from other states.* On page 16, *it refers to violations of the resale price, by dealers who had a competitive advantage.* The report says:

> *"detecting violations was very difficult, as the grocer who was receiving the rebate would not admit it, and the dealer who was also violating the law, certainly would not admit his guilt.* The means used for the rebates took several forms."

An examination of the typewritten transcript when

Witness Bronfeld was sworn, will disclose that the attorneys for the League openly ridiculed appellees' claim of rebates being given by Sheffields. Appellees' Exhibit No. 6, printed (R. 654), is a receipt form used by Sheffields in giving rebates. The customer getting the rebate signed the receipt as a voucher for the rebate received. When the receipt was produced and placed in evidence, it caused League great surprise and consternation. The original stenographic transcript should show this.

There is no valid reason for the Sheffield Company to give rebates. **There was no resale price fixed by law. It could bill customers at the actual price charged. This manner of doing business was surreptitious.** It was clandestine in nature.

It was used to cover up unfair competition made possible by the Order.

The complex operations of the League, Bordens and Sheffields; the tremendous amounts of milk handled; the intricate and multiple classifications of milk all afford opportunity for manipulation.

All three withdrew plants from approval of the New York City Health Department during September and October (R. 676). The motive for these shifts is known only to those companies. That they were coincident with the operation of the Federal Order, warrants the inference that some advantage was gained by the change.

The League and Sheffields are convicted, by the evidence, of unfair trade practices. No rebuttal was introduced to the proof that the League on September 4th, initiated the capture of Jetter's customers. The Sheffield Company may be excused for offering no rebuttal. It was not a party to the action. It was not afforded an opportunity to repudiate the testimony of Rose Paley that she was given 35 cases of free milk to induce her to cease purchasing milk from an independent dealer, Grand View Dairy, or the other testimony as to its price cutting. Its method of giving rebates could hardly have been denied.

Exhibit 6 presented documentary proof which could not well have been refuted.

K. The Order Could Have Treated All Handlers Equally or Nearly So. It Need Not Have Discriminated Between Either Dealers or Producers.

It is indeed most unfortunate that the Order, which was designed to help producers and place distributors on a basis of equality, by its provisions, has defeated the purpose and intent of Congress as expressed in the Act.

The Jetter Dairy Company paid its pool obligation to the Settlement Fund for September. If the competitive advantages to the larger companies had not been used in price cutting and unfair competition, doubtless this case would not now be before the Court.

Even with the discriminatory provisions, had the Order contained a fair trade practice clause (permitted by the Act), chiseling might have been kept to such a minimum that efficient independent dealers could have survived.

The argument that Jetter lost nothing is ridiculous. His minimum cost of milk was 9¾¢ per quart. He had to sell at from 8¢ to 9¢ per quart. A resulting loss is self-evident. Any argument to the contrary is an insult to the intelligence.

Jetter lost heavily in customers. To recapture his trade, he had to make price concessions which are set forth. Finding No. 67 (R. 146) shows the situation as follows:

> "67. *From September 1st, 1938, to January 1st, 1939, the Jetter Dairy Company lost 240 cases of daily trade to competitors by reason of concessions. It recaptured upwards of 40 cases of this trade,* but in doing so was obliged to give in free milk, cream and cash, several hundreds of dollars. *In addition, said defendant sustained a loss on each quart of milk sold by it through the Jetter Dairy Company or the Triboro Milk & Cream Co., which sells milk received from producers delivering to*

the Jetter Dairy Company. In order to stop further losses of trade captured by competitors who undersold the Jetter Dairy Company and Triboro Milk & Cream Company, the said defendant was obliged to reduce the price of milk charged to all customers to prices ranging from 8¢ to 9¢ per quart, in order to meet such competition. The principal stockholders of Jetter Dairy Company and Triboro Milk & Cream Co. are identical." (Emphasis supplied.)

Finding No. 68 refers to the absence of a fair trade practice clause, permitted by the statute, as follows (R. 146):

"68. The Order contains no provision prohibiting unfair methods of competition and unfair trade practices, as permitted by Title 7, Section 608c (7) (A)."

Appellees' defense that the statute, as applied in the Order, is being used as an instrument of private monopoly, confiscation of property, and restraint of trade, is addressed to the conscience of the Court, as well as to the law.

This will be further considered.

POINT II.

The discriminatory provisions of the order referred to in Point I, are not authorized by the Act. They are confiscatory. They take the property of appellees for (an alleged or) a public use and transfer the same to others, without just compensation, contrary to the Fifth Amendment.

None of the discriminatory provisions are authorized by the Order. There was no design on the part of Congress to allow dealer co-operatives, by exemption from regulation, to establish a private monopoly. If so, it certainly was not the intent of Congress to extract moneys from

the capital of other producers and proprietary dealers as a subsidy to the monopoly.

A. The Defense That These Provisions Are Unauthorized, is Properly Raised by Appellees in Their Pleadings.

Appellant, in its brief, page 155, urges that the appellees have no legal standing to complain of these provisions, saying at page 156:

> "* * * The answers filed by the several appellees do not allege that these provisions of the Order are not authorized by the Act. *Since a lack of authority in the Act for these payments would clearly be an affirmative defense, it follows that the issue was not before the District Court, and that the Court erred in passing on the question.*" (Emphasis supplied.)

This argument is without force.

Appellees were the *defendants* in the action. It was brought *against* them. Injunctive relief, enforcing the Order, was asked. Appellant, as plaintiff, had the burden of proof to affirmatively establish its cause of action against appellees.

In both complaints, it alleged:

> "The Secretary on August 5, 1938, issued Order No. 27 * * *, *said Order containing the terms and conditions authorized by* the applicable provisions of the Act, *and no others*" (R. 3-42). (Emphasis supplied.)

The appellees, in their answers admitted (Rock Royal and Schuyler Junction "on information and belief"):

> "That the Secretary on August 5, 1938, issued Order No. 27" (R. 63, 85).

All three appellees alleged:

> "Defendant further answering the complaint * * * denies the same and each and every allegation therein contained not hereinbefore specifically admitted or denied" (R. 64, 70, 71, 87, 88).

Appellant (plaintiff), in its complaint *anticipated a defense that certain terms and conditions of the Order were unauthorized by the Act.* It asserted that such an affirmative defense was not available to the appellees (defendants), saying

> "said Order containing *the terms* • • • *authorized by* • • • *the Act, and no others.*"

This squarely put in issue whether the terms of the Order were authorized by the Act. It is stated 49 Corpus Juris, page 182, Section 202, that

> "the mere form of a plea or answer will not be allowed to affect any substantial right, so long as it does not mislead or deceive the adverse party."

And in Section 200, on the same page:

> "So, a defendant may avail himself of a defense *disclosed by plaintiff's pleading* or proof."

Moore's Federal Practice, 1938 edition, Volume 1, page 568, says:

> *"Failure to plead matter which constitutes an affirmative defense does not preclude a party from taking advantage of the opposing party's proof, if such proof establishes the defense. Thus, although illegality is an affirmative defense, if the illegality appears on the face of the contract, or from the opening statement of plaintiff's counsel, or from plaintiff's proof, the defendant could take advantage of it by proper motion, and if necessary the Court will raise the objection itself."* (Citing *Oscanyan v. Winchester Arms Co.*, 103 U. S. 261.) (Emphasis supplied.)

At the close of the plaintiff's case, defendants moved for a non-suit and dismissal of the several complaints on the ground

> "that the plaintiffs failed to prove the cause of action alleged in the complaint against the defendants, or any cause or causes of action against any of said defendants" (R. 270),

and on other grounds (R. 270, 271).

"The motion was denied on *all grounds except constitutional grounds, and the variance of the Order from the statute, as to which the Court reserved decision*" (R. 271). (Emphasis supplied.)

Judge Cooper referred to the provisions of Article VII, Sections 5 and 6. He said at (R. 772):

> *"The defendants make some further contentions which may be briefly considered. It is urged that no provision of the statute authorizes Articles VII, Sections 5 and 6, of the order.*
>
> "These relate to payments of 5¢ per cwt. to co-operatives and market services of 23 cents per cwt. and transportation charges, both to co-operatives and proprietary handlers.
>
> *"The Court does not find any sections of the Act which clearly and definitely authorize such payments. If there be none, the order does not comply with the statute and should not be enforced."* (Emphasis supplied.)

Milbank v. Jones, 127 N. Y. 370, cited by appellant on its position, holds (opinion pages 375, 376):

> "* * * The answer was a general denial, and the plaintiff insisted on the trial, as he does on this appeal, that not having been informed by the answer that the illegality of the contract would be an issue on the trial, he could not be expected to be prepared nor required to meet it. *Under a general denial the rule undoubtedly is that if the illegality appears on the face of the complaint,* or necessarily appears from plaintiff's evidence, *advantage may be taken of it by defendant, who must also be permitted to controvert by evidence everything which the plaintiff is bound, in the first instance to prove, in order to make out his cause of action.* And the cases cited by the respondent in support of the ruling will be found on analysis to come within it.
>
> "In *Russell v. Burton* (66 Barb. 539) the contract, as proved by the plaintiff, was for lobby services, and void.
>
> "In *Oscanyan v. Arms Co.* (103 U. S. 261), the complaint was dismissed on the opening of plain-

tiff's counsel becau it appeared therefrom that the contract relied on was illegal.

"In *Cary v. Western Union Telegraph Co.* (20 Abbott [N. C.] 333), the plaintiff, in making proof of his contract, introduced evidence showing its invalidity."

* * * * * *

"* * * But in this case it neither appeared from the complaint or the evidence presented by the plaintiff that the contract was illegal, and as we have already shown when the plaintiff rested the evidence established a cause of action. *The general denial put in issue all matters which the plaintiff was bound to prove; nothing more. He was required to prove the contract entered into by defendant which was, on its face, valid.*" (Emphasis supplied.)

In the case at bar, the *invalidity of the Order appears "on its face," by incorporation of terms which are unauthorized by the statute.* Plaintiff was bound to prove a valid order. The authority of the District Court (8a [6] of the Act), is limited to enforcing and restraining violation of

"any Order, regulation or agreement heretofore or hereafter made or issue(d) *pursuant* to this chapter." (Emphasis supplied.)

It is academic that **plaintiff had the burden of establishing a valid Order before jurisdiction was conferred upon the District Court. As part of its case, it not only alleged the issuance of a valid Order, but affirmatively alleged there were no invalid "terms or provisions" therein.**

To deny appellees the right to urge this defense, which was anticipated by appellant in its complaint, and was argued on the trial, will be to resort to a technicality, to accomplish an injustice. This is contrary to the attitude of law courts in recent years, and to the principles of equity long established.

As will be seen, the Order is so complicated—its illegal

and discriminatory terms are not readily apparent. They were not intended to be. It took a League attorney three months to think up the first draft. Then it took from November to February before it was finally acceptable to the Bargaining Agency (R. 722, 723). The application of Article VII, Sections 1, 5 and 6, by the Administrator, was first available to appellees when they were proven on the trial. This proof was drawn from unwilling witnesses over bitter objection by League attorneys. Often, the obtaining of a single answer was the result of a half hour's argument and dispute.

The appellant desired an early trial. November 24, 1938, a motion was made by appellee Schuyler Junction for discovery, which motion was argued, opposed by appellant, November 26, 1938, and never decided, because appellees consented to an early trial.

In the stipulation of facts and evidence (R. 264, par. 62), a reservation as to validity of the Order, was made by the appellees. The paragraph says:

> *"If the Order is valid, and if the defendants are subject thereto,* the amounts due from such defendants to the Market Administrator for *payment to producers* through the Producer Settlement Fund, are as follows:" (giving figures). (Emphasis supplied.)

In this stipulation of facts, there was reserved to appellees, *the validity of the Order,* and it was also assumed that any moneys due, "were for payment *to producers* through the Producer Settlement Fund."

B. The Terms and Provisions Complained of, Are Not Authorized by the Act.

The terms complained of are *unauthorized* and *contrary* to the letter and intent of the Act.

The Act, 8c (5) (A) authorizes the fixing of minimum prices to be paid *by handlers (dealers) "for milk purchased from producers or associations of producers.* Such

prices *shall be uniform as to all handlers,* subject only to" (usual differentials).

This refers to the *total or actual price to be paid by dealers* (uniform price paid to producers or co-operative associations, plus or minus sums paid or received as a result of "handlers net pool obligation").

Section 8c (5) (B) (ii) provides for "*payment to all producers and associations delivering milk to all handlers of uniform prices* for all milk so delivered, irrespective of the uses made of such milk" (subject to usual differentials).

The clear intent of this provision is that *dealers buying from co-operatives shall pay the co-operatives the uniform price and account to the Pool for the balance.* A comparable and inconsistent illustration of application of the Order, is the method of settlement employed by Bordens and Sheffields. Bordens *pays the Dairymen's League in full for milk, reporting to the Pool, only the minute part of its transactions, had with others* (Exhibit 45, R. 674). *Bordens should have paid the League only the uniform price for all milk.*

Sheffields, however, *reported and accounted all of its milk to the Administrator* (Exhibit 43, R. 673). In theory, *it paid Sheffield Producers, a co-operative representing all milk purchased, the uniform price* (modified by negotiations covering "unpriced" milk, to arrive at *a different uniform price for all milk*) (R. 596-599, incl.).

The statute intended and *provides* that all dealers, *including co-operatives, shall actually pay the same total price for milk.* Section 8c (5) (C) provides:

> "(C) In order to accomplish the purposes set forth in paragraphs (A) and (B) of this subsection (5), providing a method for making adjustments in payments, as among handlers (*including producers who are also handlers*), *to the end that the total sums paid by each handler shall equal the value of the milk purchased by him at the prices*

> *fixed, in accordance with paragraph (A) hereof.*" (Emphasis supplied.)

The provisions of the Order providing for equalization (so far as authorized) *are permitted, and must have been adopted, under the subsection quoted,* which provides that "*the total sums paid by each handler (including producers who are also handlers), shall equal the value of the milk purchased by him at prices fixed in accordance with Paragraph "A."*

There is no authority in the statute *exempting co-operatives from paying "the equal value of milk * * * at prices fixed in accordance with Paragraph A."*

The provisions of Article VII, Section 1, requiring *payment of the uniform price* by "each handler *which is not a co-operative association of producers,*" *are contrary to the provisions of Section 8c (5) (C).*

The provisions of 8c (5) (F) permitting blending of collective sales by co-operatives qualified under the "Capper-Volstead Act," obviously intends, only, to permit co-operatives such as the League, to blend the uniform price received in the area with prices received in other areas, subject to the restriction

> "provided, that it shall not sell milk or its products to any handler for use or consumption in any market at prices less than the prices fixed pursuant to Paragraph (A) of this subsection (5) for such milk."

If, as a handler or distributor, the League was charged, and paid, the "total" price which Jetter has to pay, it could not sell milk at less than "the absolute minimum delivered cost of 9 3/4¢ per quart." It has no capital and has no right to make an illegal deduction of moneys due its producers, to be used in unfair competition. Such underpayments to producers are a violation of the Act.

As usual, the League takes the benefits; it has no duty to comply with the Act; its producers are penal-

ized. This is in accordance with past practices. Under the League contract, the League producer is the subject, in a realm where its supposed agent, the League, is the master. The agent is the sovereign. It is the "sole arbitrator" by the terms of its contract. The producer has waived his right to an accounting.

C. The Terms Objected to, Take the Property of Appellees for an Alleged Public Purpose and Transfer the Same to Others, Without Just Compensation.

We will first consider appellee Jetter.

We have already shown that the exaction from Jetter of a higher total price for milk than "the equal price" provided for in Section 8c (5) (A), is a violation of Section 8c (5) (C). The excess payments charged, constitute a taking of Jetter's moneys for the alleged public purpose of accomplishing the aims of the Act.

Appellees Schuyler Junction and Rockroyal, *were entitled to receive the full uniform price* in their adjustment with the Fund by means of their Pool obligation. Such adjustment *should leave in their hands, the full uniform price.*

The statute makes no provision as to handling charges, or other services performed by a co-operative for a handler. Under the Order, co-operatives could give to handlers purchasing from them, the services involved in receiving and shipping milk. There is nothing to prevent a co-operative from paying the freight, or furnishing other services, except that furnishing such "services" would actually reduce the total cost to the handler for milk purchased from the co-operative.

In any event, the two appellee co-operatives, were absolutely entitled to have the uniform price left, net, in their hands, after settlement with the Producer Fund.

The taking of large sums of money under Article VII, Sections 5 and 6, and the taking of 20¢ per cwt. from

the Fund, for producers in 18 counties under the provisions of Article VI, Section 8, reduced the net uniform price computed by the administrator.

The taking of this money from the Fund, reduced the uniform price and the total sums to be received by appellees. This constituted a taking of money, which appellees were entitled to receive under the Act.

The moneys deducted under Article VII, Section 3, were given to certain co-operatives, principally the Dairymen's League, which is a dealer or distributor.[2]

This is in the nature of a rebate to the League, on all milk sold by it as a distributor; and as a subsidy on all milk which, as a co-operative, it sells to other handlers, including all milk received by Bordens in plants owned and operated by the Borden Company. Appellant in its brief, page 156, urges that

> "these payments are simply one feature of the distribution of the burden of the surplus milk among all producers."

In other words, it is for an alleged public purpose. Actually, the payments are neither contemplated nor authorized by the Act. They are repugnant to "equalization," which the statute sought to accomplish. They were a basis of inequality.

Market service payments under Article VII, Section 6, are unauthorized and unnecessary under the Order, except as to handlers with no manufacturing facilities whatever (discussed Point I-E).

While the Act does not specifically authorize such payments, when applied to relieve handlers operating fluid milk stations, of the expense of receiving and transporting milk which it can only re-sell at the Order price to other handlers, they might be justified.

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2 It will be noted that the provisions of Section 8c (5) (C) do not consider a co-operative, as such, a handler. The obvious intent of the language employed, is that only co-operatives who are also dealers or distributors, are also handlers.

There is no authority for giving a rebate of 23¢ per cwt. to large handlers, co-operative and proprietary, on milk which is customarily handled at a profit in ordinary manufacturing operations. It constitutes a bonus to those handlers taken from the producer settlement fund, in which appellees Rockroyal and Schuyler Junction have a fixed financial interest. It takes their property for an alleged public purpose, without compensation.

These payments constitute a rebate; reduce the "total" price paid for milk by these large companies; they result in the exaction of a higher "total" price from appellee Jetter, than is charged those companies, thereby taking Jetter's money for an alleged public purpose.

That appellees receive no payment or reimbursement for their moneys, so expropriated, needs no argument. They are not paid or reimbursed.

We conclude:

1. The Act was not designed, and by its terms, does not authorize, the exemption of producers or co-operatives "who are also handlers" from regulation.

2. It does not authorize taking of moneys due producers and co-operatives for payment to other co-operatives and proprietary handlers.

3. It does not authorize exaction of a "total" price for milk from Jetter, which is higher than the "equal" price required to be charged *all handlers*, co-operative or otherwise, under 8c (5) (A) (C) of the Act.

4. It neither intended nor authorized the expropriation of such moneys from appellees and payment to appellees' competitors[3], in the nature of a subsidy in the establishment of a private monopoly.

5. The dealers receiving competitive advantages are entitled to no subsidy from the capital of ap-

[3] Appellees Rock Royal and Schuyler Junction are selling milk to dealers in competition with the League and other co-operatives.

pellees, nor from other producers or proprietary dealers in a like situation, in this scheme in restraint of trade, and in the interests of monopoly.

We have already covered at length, Point IA, IB, and IC, the discrimination resulting from regulating only part of the milk purchases by the three large groups. These reduce the price paid for milk by those groups; reduce the amounts received by the co-operative appellees, in the uniform price; and result in charging Jetter and others in a like situation, a higher total price for milk than that paid by the favored companies.

D. The Taking of Moneys of Appellees for an Alleged Public Use, and Transferring the Same to Others, Without Just Compensation, is Violative of the Fifth Amendment.

This legal proposition is based upon the theory that the government is setting a rate or price, the inevitable consequence of which is the deprivation of the property of the defendant Jetter and the analogy is based upon public utility rate fixing cases, as well as upon the taking of property from one and giving to another.

These are the propositions:

1. Jetter lost money.

2. Its loss was not due to inefficiency or competition from those who were in the same status as it.

3. The loss was the direct proximate result of this scheme of regulation.

The due process clauses of the 5th and 14th Amendments protect persons from having their property unreasonably or arbitrarily confiscated under the guise of regulation of rates or prices, and this has been recognized on innumerable occasions since public regulation began.

The earliest cases concerning deprivation of property were in the field of public utilities. They involved claims of violation of due process where rates fixed, denied a

fair return on capital investment, or would result in confiscating capital.

In the leading case of *Smyth v. Ames,* 169 U. S. 466 (1897) with citation from many previous cases, this Court held that a state could not confiscate the property of railroads by fixing arbitrary rates. On page 525 of that case, the Court quoted from *St. Louis & San Francisco Railway v. Gill,* 156 U. S. 649, 657, as follows:

> "* * * There is a remedy in the courts for relief against legislation establishing a tariff of rates which is so unreasonable as to practically destroy the value of property of companies engaged in the carrying business and that especially may the courts of the United States treat such a question as a judicial one."

This proposition is so well established in constitutional law that there is little need to cite at great length to sustain it.

The principle that the government in its regulation of business may not establish a confiscatory rate or price is not limited to public utilities. In *Aetna Insurance Co. v. Hyde,* 275 U. S. 440, the attack of a large number of fire insurance companies upon a Missouri statute upon the ground that the rates were confiscatory in violation of due process was unsuccessful because none of the companies was willing to admit, nor did it allege, that it would itself be injured by the proposed schedule of rates. But this case clearly recognized that the rates in a proper case with proper parties would be subject to attack if they resulted in confiscation. On page 447, the Court stated:

> "*Jurisdiction of this court to set aside state-made rates as confiscatory* will be exercised only in clear cases. And the burden is on one seeking that relief to bring forward and satisfactorily prove the invalidating facts." (Emphasis added.)

In the cases in which milk-control statutes have been upheld this Court has been careful not to uphold them

without reservation. In *Nebbia v. New York*, 291 U. S. 502, 536, this Court stated:

> "It is clear that there is no closed category of businesses affected with the public interest *and the function of courts in the application of the 5th and 14th Amendments is to determine in each case whether the circumstances vindicate the challenged regulation as a reasonable exertion of governmental authority or condemn it as arbitrary and discriminatory.*"

In *Hegeman Farms Corp. v. Baldwin*, 293 U. S. 167, Mr. Justice Cardozo indicated that the dealer should have applied to the Milk Control Board for relief but in this case the defect is in an order which has a provision allowing exemptions of co-operatives from the price provisions. Should this Court hold that the Act authorizes such Order, then the exemption is by the Act. No appeal to the Secretary could have been of any avail.[4] On page 170 the Court stated "the 14th Amendment does not protect a business against the hazards of competition. * * * It is from hazards of the Order, *and not from restraints of law capriciously imposed*, that the appellant seeks relief."

Jetter is not complaining because he is injured by the "hazards of competition" which are referred to in many cases. He is complaining because an Order has been imposed upon the milk industry which by its terms places the small independent dealer and small co-operatives at the mercy of Bordens, Sheffields, the Dairymen's League (and several others), which control over 50 per cent of the fluid milk marketed in the metropolitan area (R. 144, Finding of Fact 56 ([f]).

A system of governmental regulation can result in confiscation by *creating a condition* wherein the prices fixed cannot afford a return sufficient to operate, as easily as it can by fixing prices which will directly necessitate a loss. It may be, under proper circumstances, creating

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4 Discussed under Point II-E.

such a condition would be reasonable but a regulatory program which exempts the three big companies, which control 50 per cent of the fluid milk market, from its operation cannot be called reasonable. Bordens, Sheffields and the League are just as much proprietary handlers as is Jetter. There is no reason why they should be *subsidized* because of their greater size. The market administrator is able to fix prices for nine different classifications of milk sold in varying markets. There appears no adequate reason why fluid milk sold outside of the state could not be included in the pooling arrangement, nor is there a valid reason why this "unpriced" milk should be used in a blending operation at arbitrary prices in determining the actual price paid to producers.

So far as a producer is concerned, he sells so many quarts of milk and gets a return which averages a certain number of cents a quart. The different accounting devices which determine his ultimate price in terms of transportation, butterfat, and other differentials are fictions to him.

Thus when these companies "blend" their out-of-state milk at outrageously low prices, the farmer doesn't know what accounting "price" has been allocated to this milk. All he knows is that he is paid at a lower rate for all his milk than producers who sell to dealers who do not have the "advantages" of blending. With all of the other differentials involved it is unlikely that the farmer can really be sure as to how much loss this would mean to him anyway.

When these companies are allowed these devices, the record substantiates what common sense would prophesy. To make a person pay uniform prices while giving to a business competitor the power to reduce prices with impunity under the cloak of exemptions granted by the governmental regulation shocks the senses of morality.

The impossibility of surviving under these conditions is just as much a product of the government regulation as would be a fiat declaration that henceforth all railroads

shall operate for nothing, and is just as certain in its results.

Jetter is not paying a single price for his milk but is in reality making two payments. One of these payments goes into the computation of the uniform price and may be called a payment for the milk. The other payment, part of which ends in the pockets of the League or large companies which qualify for payments under Article VII, Section 6, is not a part of the price paid to producers at all. Price represents the terms of a bargain between buyer and seller and when a third person extraneous to the bargain is paid a subsidy, that cannot well be called part of the price.

Taking the property of Jetter and giving it to the League violates due process of law.

> *Railroad Retirement Board v. Alton*, 295 U. S. 330;
> *Thompson v. Consolidated Gas Utilities*, 300 U. S. 55; and
> *United States v. Butler*, 297 U. S. 1.

The *Thompson* case deals with an Act which undertakes the drastic provisions to end the waste of sweet gas. The statute, in effect, took pipe lines owned by plaintiffs for the use of others. The Court said in the opinion, pages 79 and 80:

> "Our law reports present no more glaring instance of the taking of one man's property and giving it to another. In *Missouri Pacific Ry. Co. v. Nebraska*, 164 U. S. 403; *Missouri Pacific Ry. Co. v. Nebraska*, 217 U. S. 196; *Great Northern Ry. Co. v. Minnesota*, 238 U. S. 340; *Great Northern Ry. Co. v. Cahill*, 253 U. S. 71; *Delaware, L. & W. R. Co. v. Morristown*, 276 U. S. 182; and *Chicago, St. P., M. & O. Ry. Co. v. Holmberg*, 282 U. S. 162, expenditures directed to be made for the benefit of a private person were held invalid, although the party ordered to pay was a common carrier. In *Loan Association v. Topeka*, 20 Wall. 655, and *Cole v. La Grange*, 113 U. S. 1, the payments ordered for the benefit of a private person

were declared invalid, although the money was to be raised by general taxation. In *Myles Salt Co. v. Board of Commissioners*, 239 U. S. 478, the exaction was held lawful, though imposed under the guise of an assessment for alleged betterments. Compare *Georgia Railway & Electric Co. v. Decatur*, 295 U. S. 165. And this Court has many times warned that one person's property may not be taken for the benefit of another private person without a justifying public purpose, even though compensation be paid. See *Hairston v. Danville & Western Ry. Co.*, 208 U. S. 598, 605, 606; *Rindge Co. v. County of Los Angeles*, 262 U. S. 700, 705. Compare *Cincinnati v. Vester*, 281 U. S. 439, 446, 449."

The case of *Railroad Retirement Board v. Alton R. Co.* 295 U. S. 330, deals with pooling of contributions of all railroad carriers in providing a retirement fund for employees attaining 65 years of age. This Court disapproved discriminatory provisions therein which are comparable to those effected in the Order, which is here litigated. They are disapproved as being arbitrary and unreasonable.

The Court points out, page 351:

> "That the Act assumes that, in fairness, both employer and employee should contribute in fixed proporations to a liberal pension. *But we find that in contradiction of this recognized principal, thousands of those in the service at the date of the Act, will at once become entitled to annuities though they will have contributed nothing to the fund.*"

The principle is applicable to this case. The Act assumes fair treatment to all handlers and all producers and associations of producers. In contradiction to that assumption, we have pointed out that the Order lacks the element of equality or fairness; that it is discriminatory as between handlers, producers and producer associations.

At pages 356 and 357 of the *Alton* case, the Court says:

> "* * * The railroads are not only liable for their own contributions, but are, in a measure made insurers of those of the employees. This appears to be an unnecessarily harsh and arbitrary imposition, if the plan is to be what on its face it imports, a joint adventure with mutuality of obligation and benefit.
>
> "This court has repeatedly had occasion to say that *the railroads, though their property be dedicated to the public use,* remain the private property of their owners, and that their assets may not be taken without just compensation. The carriers have not ceased to be privately operated and privately owned, however much subject to regulation in the interest of interstate commerce. *There is no warrant for taking the property or money of one and transferring it to another without compensation, whether the object of the transfer be to build up the equipment of the transferee or to pension its employees.*"

Milk is not yet a public utility. There is not as much justification for the discriminatory provisions of the Order, taking the property of appellees and giving it to other handlers in the furtherance of private monopoly, as there was for requiring contributions to the Pension Fund, which the Court disapproved.

To the same effect, see *Monongahela Navigation Co. v. United States,* 148 U. S. 312, 336; *Louisville Joint Stock Land Bank v. Radford,* 295 U. S. 555, 589, 602.

The case of *Currin v. Wallace,* passing on the Tobacco Inspection Act of 1935, decided January 30, 1939, as yet unreported, makes no different ruling. The Court stated in the opinion:

> "Finally, plaintiffs invoke the due process clause of the Fifth Amendment. Plaintiffs are warehousemen and auctioneers acting as agents for the growers who own the tobacco and pay their commissions. Plaintiffs are thus in the position of contesting a regulation for the benefit of their principals because of an alleged interference with their business. *The Act does not affect their*

rate of charges and does not deprive them of any property." (Emphasis supplied.)

Appellee Jetter was deprived of its customers as well as its money. Much evidence in the record shows the cost of procuring those customers in the New York market. Free milk and other concessions had to be given to get them and retain them. Good will was a tangible asset. At any rate, loss of a customer represented a tangible loss (see cost to Jetter of regaining 40 cases of the 240 cases of trade lost, R. 653). Judge Cooper pointed out in his opinion (R. 765):

> "Co-operatives which are also milk dealers or handlers, may and do pay their producers less than the uniform price and from their payments into the Producers Settlement Fund, if any, they receive payments back for services, which proprietary handlers cannot, and do not, receive.
>
> "In fact, there is very little that a proprietary handler, who does not sell any milk outside the marketing area, and who has no plant to which he can transfer surplus milk, can do to recoup his losses. He cannot reduce his price by 'blending' a fictitious value on 'unpriced' milk with that sold in the area. He has no unpriced milk. He has no manufacturing plant, and may possess neither capital or inclination to enter the manufacturing field already principally covered by Dairymen's League, Bordens, National, and some of the larger independents."

On pages 766 and 767, the Court said:

> "*Moreover, there is nothing to prevent the Dairymen's League and other large producers from further depressing the price of milk sold in the marketing area in order to capture the customers of competitors and thus forcing the Jetter Dairy Company and others in like situation, out of business at an even more rapid rate.*
>
> "The Dairymen's League Co-operative, however, could go on indefinitely for the statute and order are greatly discriminatory in favor of co-operatives, especially large ones, which can take advantage of all the opportunities it presents.

"The property of the Jetter Company and, of course all other proprietary handlers and smaller co-operatives is thus taken by operation of statute and without the due process of law required by the Fifth Amendment.

"This brings us to the consideration of the questions of law here involved, apart from the misrepresentations to producers in connection with the referendum.

"The two most important questions of law are these:

"1. Does this statute as applied in the order, in its operation under the conditions here existing, violate the Fifth Amendment to the Federal Constitution prohibiting the taking of property without due process of law or the taking of private property for public use without just compensation?

"2. Can the discriminations in favor of co-operatives be upheld under the circumstances here existing on the ground that producer co-operatives may legally receive the special preferential treatment provided in order 27?

"It is held by high authority that even though a statute may be constitutional on its face, and may be valid when enacted or when given a particular application, it may be invalid under changed conditions or when given an application which results in arbitrary and prejudicial discrimination or when its operation results in the taking of property of one without compensation and transferring it to another.

Concordia Insurance Company v. Illinois, 299 U. S. 535, 545.
Borden Company v. Baldwin, 293 U. S. 194, 210.
See also *Airway Corp. v. Day,* 266 U. S. 71, 85.
Nebbia v. New York, 291 U. S. 502, 537.
Great Northern Ry. v. Washington, 300 U. S. 154.
The Acts of Congress under the commerce clause are subject to the Fifth Amendment.
Currin v. Wallace, supra." (Emphasis supplied.)

Futher discussion on this subject or citation of authorities is unnecessary. It would be cumulative.

E. No Relief Was Obtainable by Application to the Secretary for Review of the Order.

Argument that application should have been made to the Secretary of Agriculture for modification of the Order, is discussed by Judge Cooper (R. 764) as follows:

> "It is quite true, as urged, that the defendants might have applied to the Secretary of Agriculture for a modification of Order No. 27 in some or all of the respects in which they are aggrieved thereby.
>
> "But it is not to be supposed that there could be quick action upon such an application for modification of the order and in the meantime great detriment might result to the handlers.
>
> "The handler must comply with the order during such time as it takes for the Secretary to entertain, hear, and decide the application for modification of the order and for such further time as it takes for a Court to decide whether modification should have been granted.
>
> "The statute also provides."

Section 8c (15) (B) states:

> "The pendency of any proceeding instituted pursuant to this subsection (15), shall not impede, hinder or delay the United States or the Secretary of Agriculture from obtaining relief pursuant to Section 8a (6) of this Title."

Such review would have afforded no relief to appellees. Moneys in excess of the total equal price which they were obligated to pay, were being distributed monthly to producers and handlers. Once distributed, they could not be recovered.

F. The Dairymen's League, as a Co-operative Was Not Entitled to the Discriminatory Benefits Allowed by the Order.

The Government's brief, pages 131 to 142, urges, in effect, that discrimination in favor of a co-operative now has approval of the Courts. We disagree with any

such theory. It is proper that the Government should encourage and aid co-operatives in all legitimate respects. We do not believe there has been any change in the principle announced in the case of *DuPlex Printing Co. v. Deering*, 254 U. S. 443. In construing the Clayton Act, 38 Stat. 730, 15 U. S. C., Sec. 17, and its exemption in favor of labor organizations and co-operatives (cited by appellant on page 135 of its brief) the Court said, at page 469:

> "* * * The section assumes the normal objects of a labor organization to be legitimate, and declares that nothing in the anti-trust laws shall be construed to forbid the existence and operation of such organizations or to forbid their members from lawfully carrying out their legitimate objects; and that such an organization shall not be held in itself—merely because of its existence and operation—to be an illegal combination or conspiracy in restraint of trade. *But there is nothing in the section to exempt such an organization or its members from accountability where it or they depart from its normal and legitimate objects and engage in an actual combination or conspiracy in restraint of trade. And by no fair or permissible construction can it be taken as authorizing any activity otherwise unlawful, or enabling a normally lawful organization to become a cloak for an illegal combination or conspiracy in restraint of trade as defined by the anti-trust laws.*"

However, appellees again urge that the discriminatory provisions are not authorized by the Act. In interpreting the provisions of the Act, it is elementary that the Court shall interpret it within the Constitution, if possible. For this reason, the terms criticized should be considered outside the Act. We have pointed out that even if the Court considers the provisions constitutional they are unauthorized under the language of the Act (Point II B).

Co-operatives in General.

There is no single economic definition which can include the varying types of co-operatives which exist. Similarly, it is not possible to treat all so-called co-operatives equally in the eyes of the law. Both the majority and dissenting opinions in the case of *Frost v. Corporation Commission*, 278 U. S. 515 (1929), talked in terms of economics. The majority held that a discrimination in favor of co-operative cotton-ginning could not be upheld since the organization was financed by private capital which was allowed to get a return on its investment.

The opinion held:

> "A classification to be valid must rest upon some ground of difference having a fair and substantial relation to the object of the legislation so that all persons similarly circumstanced, shall be treated alike."

The Order here litigated, does not even treat co-operatives alike. The minority opinion pointed out that a large sum of money was necessary to finance such an organization and therefore felt that the discrimination was valid and that a genuine co-operative was involved. It is important to note that this case involved a co-operative which would be merely running *one* ginning establishment. Also the protest which was upheld in that case was being made by a company which maintained that it should not be subjected to the competition of a co-operative and that its property rights in its franchise were being invaded. Jetter does not maintain that he has a franchise in the milk business. The property which he claims is being invaded is his capital which is being absorbed as a direct result of the arbitrariness of this Order. On fair terms of competition, he could survive on the basis of efficiency as against the Dairymen's League. He is complaining because he is not allowed to compete with the Dairymen's League, Bordens and Sheffields on anywhere near equal terms. He is compelled

to pay a fixed price to his producers while they are exempted from paying such a fixed price and in addition he is forced to make payments into the Producers' Settlement Fund which are arbitrarily distributed among his competitors to be used in destroying his business.

The point is that a farmers' co-operative of two or three hundred farmers which is formed for purposes of collective bargaining and removing the individual farmer from his position of individual helplessness is a far different proposition from a colossus which at its base, controls twenty thousand producers and which handles 34 per cent of the milk which is sold in the metropolitan milk market.

Differences in size may make a tremendous difference in the realities of the situation. The League possesses its own milk stations, its own manufacturing plants; it has a large-scale contract with Bordens which is a national figure in the milk industry. It controls milk from the producer to the store. Over the producers at the base there is erected a vast organization of others whose interests are an important part of the organization and may easily not be identical with those of the producers.

The directors may remain producers nominally by their continued ownership of farms which they run as a business by employing others to manage them but they are now men of the business world regardless of their origins. Large numbers are hired to run the country receiving stations and to take care of transportation, to act as officers in the hierarchy of management, to provide suitable publicity and public relations, to run the manufacturing plants and work in them, and to handle the details of marketing in New York and elsewhere. The business of handling milk which amounted to 163 million pounds even in the short month of November, 1938, is big business. Although the producers are members of the co-operative they can hardly be said to be the only ones interested in its operation.

The directors are little more amenable to the dictates of an individual farmer than would be a director of a large steel company to one of its shareholders. The nature of the contract between the producer and the co-operative has elsewhere been pointed out in Appellee's brief. The co-operative has control of a sufficient number of milk stations so that in many areas producers have no choice but to sell milk to the League or else not sell it at all. To call an organization of this huge nature, which is a vertically integrated big business, by the same name as a small co-operative organized within a small area is to tend to confuse the great distinctions between them. The form of an organization does not always reveal the dominating forces behind it. This organization has a much greater analogy to a proprietary corporation than it has to a small group of farmers acting jointly to protect themselves from exploitation.

The *directors* of this co-operative *have secured a milk control Order wherein the co-operative is paid subsidies* out of the Producers' Settlement Fund but *they have also secured* an order *whereby the co-operative is enabled to pay* back to its *producers less* than the uniform price even after its profits on out of state milk and subsidies from the Producers' Settlement Fund are included.

It has been maintained by the Government that a co-operative could not long continue to pay a less price than others because it soon would lose its producers. The fact that many producers have no choice but to accept such less price has been previously pointed out.

But there is another intangible factor which must be reckoned with. The *word "co-operative" produces an immediate favorable emotional response on all who hear it. Producers are often persuaded to accept lower prices than is being paid to others because they are duped into believing that they are making a sacrifice in order to attain an ideal of fair treatment for themselves some time in the future. It is a vain hope but it possesses a powerful appeal.*

In chain store tax cases this Court has recognized differences in size as being a reasonable basis of classification and this is also recognized in our income tax and monopoly laws. Similarly this Court may agree that differences in size may compel as well as allow distinctions between different businesses. What is reasonable legislative benevolence toward a small co-operative formed to protect its individual members from external menaces may well become arbitrary discrimination when the advantages are conferred upon a large-scale business which already controls over 34 per cent of the giant milk industry of New York State and which is intimately connected with Bordens.

(Cf. *Great A. & P. Tea Company v. Grosjean*, 301 U. S. 412.) Where size is a permissible ground for discrimination *against* a company it is hard to feel that discrimination *in favor of* a gigantic organization such as this is justified.

G. There Is No Decision of a Lower Court Passing on the Questions Here Raised, Except the Case at Bar.

The Act, insofar as it regulated milk, contains specific provisions relating thereto, which are different from those passed on by this Court in *Currin v. Wallace, supra.*

The questions here raised differ from those in the *Currin* case, in two respects:

1. Here, it is claimed that the application of the Act is unauthorized, contrary to its express provisions, and violative of the Fifth Amendment.

2. That the equalization features operated through a market-wide pool, are discriminatory as between dealers, co-operatives, and producers.

3. That the provisions are an unlawful delegation of legislative power to co-operatives.

The cases cited by appellant, pages 150-153 of the brief on this subject, to the extent we have been able to examine the same, do not raise the issues presented under

appellees' Points I and II. In the *Boston Order* case, reviewed in *U. S. v. Whiting Milk Co.*, 21 Fed. Supp. 21, and the case of *U. S. v. H. P. Hoods & Sons*, decided February 23, 1939, now on appeal to this Court, and to be argued immediately following this case, no similar issues appear to be raised.

In those cases, there is a great challenge to the validity of the Act, and to the provisions authorizing equalization. Those decisions do not in any manner, pass upon the questions here raised.

In the case of *U. S. v. Krechting*, an Ohio case, unreported, cited on page 153 of appellant's brief, the Court said:

> "There was also evidence that some producers and their handlers were in a preferred position because their business consisted principally of the distribution of Class 1 milk (bottled milk), at contract prices lower than the proposed prices; that other handlers were at a disadvantage because they were being forced to take a disproportionate share of the surplus milk to support the market, and that if and when the order became effective the first group would not only lose their favorable status but would be forced to assume a share in the distribution of surplus milk, to the advantage of the large users of Class III milk (milk products)."
>
> * * * * * *
>
> "It may be conceded that defendants will lose their present favorable status, by reason of Order No. 22, but unless they assume their proportionate share of the burden of the orderly disposition of the surplus milk, their present favorable position is only temporary, as they are always vulnerable to attacks of price cutting and unfair competition."

In that case, we assume that there was actual equalization; that there were no competitive advantages to anyone and that the defendants obtained the benefits of immunity to price cutting and unfair competition intended by the Act.

We do not have the unreported decisions in the case of *U. S. v. Babcock Dairy Co.*, or *U. S. v. Beraneck*, and accordingly are not familiar with the issues raised. They are cited on page 153 of appellant's brief, but no issues raised in any of the five milk cases there referred to, are discussed in appellant's brief, as being the same as the issues in this case.

H. The Court Properly Refused to Grant the Injunction.

Section 8a (6) under which this action is brought, vests the several district courts with jurisdiction to enforce and restrain violation of "any order, regulation or agreement heretofore or hereafter made * * * pursuant to this Chapter" (the Act).

There is no duty resting upon the Court to enforce an invalid regulation or any agreement which was illegal. The Court should grant such an injunction only "in an appropriate exercise of the equity powers of the Court," *Virginian Ry. v. Federation*, 300 U. S. 515. In that case, the Court reviewed the powers and duties of a court of equity. It said at page 552:

> "* * * Courts of equity may, and frequently do, go much farther both *to give* and *withhold relief in furtherance of the public interest* than they are accustomed to go when only private interests are involved." (Emphasis supplied.)

The Court also said on page 551:

> "* * * But the extent to which equity will go to give relief where there is no adequate remedy at law is not a matter of fixed rule. It rests rather in the sound discretion of the Court. *Willard v. Tayloe*, 8 Wall. 557, 565; *Joy v. St. Louis, supra*, 47; *Morrison v. Work*, 266 U. S. 481, 490; *Curran v. Holyoke Water Power Co.*, 116 Mass. 90, 92."

Section 8a (6) was not mandatory or conclusive upon Judge Cooper, nor was the Order. Congress could not thus transform the equity jurisdiction of the Court into a mere ministerial formality. Nor did it attempt to do so.

Before granting the relief asked, the conscience of the Court should be satisfied. Judge Cooper considered this proposition, saying at (R. 759) of the record:

> "Should the conscience of the Court be satisfied that the order should be enforced when it was adopted on such a referendum and under the circumstances here shown? Manifestly not unless the Secretary's finding is binding on the Court, despite the fact that some of the misinformation was contained in departmental literature sent to producer voters.
>
> "It is said that the Secretary cannot be held responsible for the acts of the Bargaining Agency and the Dairymen's League. There can be little doubt of the co-operation between Federal and State Agents with the co-operatives to bring about a favorable vote for the order in the referendum. Of this, the Secretary himself was probably unaware and relied on his subordinates."

POINT III.

The referendum, on which the Order is predicated, is a nullity.

Appellees pleaded as a defense, that prior to the referendum the terms and effect of the Order were misrepresented to producers. It was represented that under the Order, *all handlers would pay the same cost for milk and all producers would be paid at a uniform rate. The Order in effect, was directly contrary to the representations.*

Appellees contended that *a vote* by producers *to the effect that they favored an Order which treated all handlers and all producers alike, would not warrant* the finding of the Secretary *that the producers favored an Order which charged* handlers *different* prices for milk *and returned very few producers, the so-called "uniform" price.*

The clear intent of the Act is that the true wishes of the producers, are binding on the Secretary. To them (supposedly) is given the power to permit or prevent issuance of the Order by the Secretary. Surely, it is a legal defense in this action to assert that the referendum was a sham; that the votes cast were obtained by deliberate fraud and in no way reflected the true "favor" or "disfavor" of producers which Congress has made binding on the Secretary.

Appellees in their answers assert that less than two-thirds of the producers expressed themselves in favor of the Order, as explained, and that the "Finding" by the Secretary is without probative evidence to support the statement, and amounts merely to an expression of opinion by the Secretary as to the matters purported to have been found.

The Secretary was not at liberty to "find" that two-thirds of the producers favored the proposed Order, without some definite basis on which to predicate the "Finding." In the case of *Butler v. United States*, 78 Fed. (2) 1, affirmed 297 U. S. 1, the Court said at page 11:

> "It cannot be said that the Secretary's judgment that his acts will tend to effectuate the general policy laid down by Congress can be called a finding, as his judgment involves merely his opinion as to the general effect of the agreements he executes to equalize the purchasing power of the commodity in question with that of the five-year pre-war period."

And in *A. L. A. Schechter Poultry Corp. v. United States*, 295 U. S. 495, in pointing out that the President's power to formulate codes under the National Industrial Recovery Act, left him free to "roam at will," the Court said at page 538:

> "That is the precise effect of the further finding that the President is to make—that the code 'will tend to effectuate the policy of this title.' While this is called a finding, it is really but a

statement of an opinion as to the general effect upon the promotion of trade or industry of a scheme of laws."

The producer referendum took place long after the public hearings, and no claim either can be, or is made, that the Secretary's "Finding" of favor, resulted from those hearings. The (Rock Royal) complaint, paragraph IX (R. 3) alleges that the terms of the Order were predicated "upon the evidence introduced at the said hearing." Paragraph IX of the complaint states:

> "Pursuant to the provisions of Section 8c (19) of the Act, the Secretary conducted a referendum of producers for the *purpose of ascertaining* whether the issuance of the Order was approved or favored *by at least two-thirds of the producers.*"

Paragraph X states:

> "After conducting said referendum and after the refusal or failure of handlers * * * to sign * * *, the Secretary on the 24th day of August, 1938, determined * * * (C) that the issuance of the Order was approved or favored by at least two-thirds of the producers who * * * *voted in the above mentioned referendum.*"

The producers voted upon the question presented to them. The question as presented, was whether the producers favored an Order which required equal payments to all producers, and payment of the same price for milk by all handlers.

The "Finding" of the Secretary that two-thirds of the producers favored the Order, is wholly unsupported, and amounts only to an expression of opinion by the Secretary which is contrary to the opinion of producers reflected in the referendum. Jetter's first and third defenses state the facts supporting this contention. The producers' (and co-operatives') vote that they favored an Order requiring equal prices to all producers and equal prices to be paid by all handlers, *may reasonably be interpreted as a vote that they would not approve an*

Order which did not require equal prices to all producers, and the same price to be paid by all handlers.

The findings set out in detail the wide-spread misstatements above quoted. The publicity issued by the Bargaining Agency, Exhibits 22, 23, 23A to 23H, 23AA to 23II (R. 459 to 549), contains a part of its program of propaganda. Much which was received in evidence is among the exhibits not printed.

The publicity issued by the Dairymen's League is printed (R. 555 to R. 594). Department of Agriculture News Releases and releases by Holton V. Noyes, as Commissioner, are printed (R. 599 to 640). Judge Cooper, in his opinion, has referred to a few of them, as follows (R. 755, 756, 757):

> "'The Order (27) requires handlers to pay the uniform pool or blanket price, calculated by the market Administrator, to all producers delivering milk during any month unless the handler has received milk and sold it as Class I Milk outside the marketing area * * *.
>
> "'*Operation of the pool assures all handlers the same cost for milk sold in the marketing area, and for that milk assures payments to all producers at uniform rate except for the transportation and other differentials.*'
>
> "The last above paragraph quoted from the Government pamphlet is identical, word for word, with a paragraph contained in the Dairymen's League News of August 16, 1938, on page 5.
>
> "*These statements were incorrect. There is nothing in the Order requiring payment of a uniform price to all producers or that the uniform price or any stated price or any price determinable under the Order be paid to producers of the co-operative associations even for milk sold in the marketing area.*
>
> "About this time a pamphlet issued by the Bargaining Agency was entitled 'Mr. Dairyman—Save This Booklet.' The Plan it explains may save your farm.' On page 1 under the heading 'Principles Upon which the order is Based' appears this:

"'The fundamental requirements of the industry which the Order seeks to establish are five in number, viz:

"'1. *An equal purchase price to be paid by all dealers, for milk for the same use.*

"'2. *An equal share to each producer of the benefits of the fluid market.'*

"These are not accurate statements, for the Dairymen's League and other co-operatives are not required to pay a price equal to that paid by proprietary dealers.

"Had this order been prepared by and for the Dairymen's League and other large co-operatives, it could hardly have been more favorable to them.

"The Dairymen's League and Metropolitan Bargaining Agency publications were sent broadcast to producers urging them to vote for the order and assuring that they would receive a higher price than they had before received, and radio addresses to like effect were made.

"Following this and on August 19, 1938, and for several days thereafter the Secretary conducted a referendum. The State Commissioner of Agriculture conducted a referendum on State Order 126 at the same times and places.

"The referendum was held at the times and places set forth in a schedule of polling places issued by the Secretary prior to the referendum, 308 polling places were designated, of which 233 were in New York, 35 in Pennsylvania, and 16 in New Jersey.

"Prior to the referendum there was sent to each known eligible producer a copy of the proposed order as issued by him on August 5th, the schedule of polling places, and a pamphlet prepared by him entitled 'Questions and Answers on the Federal and State Milk Program for New York,' and another pamphlet also prepared by him entitled 'New York Milk, Explanation of Federal State Marketing Plan, contained in Order 27.'

"About 70,000 copies of these documents were sent through Federal and State Agencies to such producers.

"The Metropolitan Bargaining Agency, whose

largest and most influential member was the Dairymen's League, spent $108,637.91 to promote the adoption of this order covering salaries, publicity, printing, radio, etc., of which $12,385 was for radio addresses, $7,979, of which $12,385 was spent during the period between June 1 and September 1, during which time took place the last of the hearings and all the efforts to obtain signatures to the agreement by 50% of the handlers and to procure two-thirds of the producers to vote favorably on the referendum.

"Prior to the referendum, a list of co-operative associations entitled to vote for their members was complied. There were about 22 co-operatives found entitled to vote for their members. A letter was sent to each declaring the requirements for voting for their members. *The 22 co-operatives cast 24,903 votes, of which 24,580 were in favor of the order and 323 were against it.*

"On the referendum held August 19th for several days, 45,664 votes were cast out of a total of 60,220 producers qualified to vote, but 7,017 of the 45,664 were rejected as invalid, leaving 38,627 valid votes. Of these 38,627, 33,663 votes, or 87.1% were in favor of the issuance of the order. *Of this 33,663 favorable votes, 22,397, or slightly more than two-thirds, were cast by the Dairymen's League, Inc., alone* as a corporation for its members and other producers delivering milk to it. *It had only about 19,500 members.*

"Of the 7,017 votes rejected as invalid, 5,110 votes were in favor, and 1,437 against the order, making a total of 6,547. These were rejected because either the voters were members of co-operatives which had voted for their members or because they were not qualified to vote. 470 voters, of 7,017 rejected, failed to mark their ballots for or against the order.

"*Had it not been for these misrepresentations the order might not have had the approval of two-thirds of 38,627 votes counted as valid. 12,876 negative votes would have defeated the order. No one knows how these producers, not voted by the co-operative associations, would have voted had they but been correctly informed of the terms and effect of the order, nor how many of the 14,576*

voters who did not vote at all, nor the 7,017 whose votes were declared invalid, would have voted had there been no misrepresentations of the terms and effect of the order.

"The statute (Section 8 [c] [12]) is mandatory that the—

"'Secretary shall consider the approval or disapproval by any co-operative association * * * as the approval or disapproval of the producers who are members of, stockholders in, or under contract with such co-operative association of producers.'

"That this applies to approval upon a referendum is made clear by Section 8 (c) (19).

"So great was the power and voting strength of the Dairymen's League that no order which it opposed could be approved, for it controlled more than one-third of the entire number of producers entitled to vote.

"This, urges the defendants, may explain why the order contains so many provisions claimed to be discriminatory in favor of large co-operatives and against proprietary handlers and small co-operatives."

Judge Cooper has pointed out that of all this, the Secretary of Agriculture was probably unaware (R. 759). He has to leave these things to his subordinates. The campaign carried on with an expenditure of over $100,000 by the Bargaining Agency alone, independent of the League expenditures, and the expense of sending 70,000 copies of various misleading documents through Federal and State agencies, was one of the highest "high-pressure" efforts put forth in any line recently.

The time available to appellees to brief this case is wholly inadequate. In order that it may go to the printer before argument, no adequate review can be made of the documentary evidence. If the Court should read the extracts from the Dairymen's League (printed R. 555 to 595), and of the Bargaining Agency "Market News" (R. 511 to 546), it would have an insight into the high pressure methods employed.

For instance, at (R. 560), Lloyd C. Anderson, an attorney of Binghamton, who appeared for the Crowley Producers Association, was ridiculed and abused. During the hearings, persons in favor of the Order were praised, and those opposed, held up to ridicule and abuse (R. 562, 564, 565). We quote from pages 564-565:

> "Many Producers Testify After Hearing Master Calls Halt on Lawyer Spouting Contest
>
> Opponents of the proposed federal-state milk marketing agreement sent their wrecking crew into action at the third hearing, which was held in Syracuse, May 18.
>
> A crowd of 1,500 dairy farmers turned out for the Syracuse hearing. Half of them walked out in disgust in mid-afternoon after lawyers spouting for the opposition had wasted most of the afternoon vying with each other in what appeared to be a contest to see which could grab the most publicity."

It will be seen that the meetings were packed by the proponents of the Order.

In the Dairymen's League News of May 31st, extracts printed (R. 568, 569), we find the following:

> "Cooke Demands End of Obstructive Tactics
>
> Sensing that opponents would fight for long delay, Edmund C. Cooke, former Buffalo Congressman, who, as counsel for the Metropolitan Co-operative Milk Producers' Bargaining Agency, had skillfully woven into the record the story of farmer need for help, laid down a strenuous bombardment in the last 30 minutes of hearing. In a brunt attack he sent a trio of concluding witnesses led by Charles H. Baldwin, former state commissioner of agriculture and markets, to the stand. Next was J. C. Treat, head of the Conesus Co-operative.
>
> Last witness was E. C. Bardin, of West Winfield, veteran dairy farmer and leader of the Sauquoit Valley co-operative. Stern visaged and speaking in a calm but forceful voice, Mr. Bardin shattered the labyrinthine logic that had been woven by the adroit dealers' lawyers to gain delay.

Bardin Says Farmers Won't Wait Long

'I've been listening to these dealers—the middlemen—opposing this attempt to obtain a living price for milk,' said Mr. Bardin.

'I think when we go back and tell the farmers up in the country about this opposition by the dealers they will be all the more for this plan.

'I've never seen such a scramble by any group for an imaginary hole as has been going on here.

'I believe in this order, and I'll fight for it to the last ditch.

'I think this is the best thing for the dealers that has come up in years. They are always telling us that all they care for is that all dealers pay the same price for milk. Well, here is something that assures just that, and I can't see any harm in their all paying producers the same price. But that isn't what they want. *They want advantages.* They want to chisel. *Well, farmers aren't going to stand for it. These dealers down here are sitting on a keg of dynamite and don't know it.*'" (Emphasis supplied.)

It will be noted that Mr. Baldwin was executive secretary of the Bargaining Agency; J. C. Treat was its secretary; E. C. Bardin was its treasurer. These things are not mentioned.

These are only a few instances of the rabble-rousing propaganda with which producers and the public were bombarded.

It was carried on in the Bargaining Agency paper; in the League News; in much literature and in personal letters sent to producers; over the radio and in the public press.

It was calculated to prevent dealers, producers or co-operatives who were opposed to discriminatory provisions of the Order, from appearing and obtaining a fair hearing.

The appellees stayed away from the hearings.

Nevertheless, memorandums filed by persons who did

attend, and in evidence, as part of Exhibit 3 to the stipulation herein, contained the arguments here advanced. They were unavailing. The League and Bargaining Agency were in control. They swept everything before them. Even in the voting, co-operatives opposed to the Order were prevented from voting their total membership.

Appellee Schuyler Junction, by its president, attempted to vote for its producers (R. 757, 758); could not do so. This co-operative, operated by producers, had failed to "qualify." Only 22 of 193 co-operatives in the area "qualified" (R. 757, 758). A letter with instructions was sent out July 8th, to the co-operatives, instructing them to qualify by not later than July 16th. Judge Cooper said at (R. 758):

> "Here we have the co-operatives required to give information and determine within eight days, less time out for transportation of mail from Washington and to country districts and back to Washington, whether they favored an order not yet definitely known and whether they wished to vote as a co-operative for or against such order.
>
> Assume four days for transportation (two days each way) that leaves four days for the collection of the information, calling meetings of directors, and determination whether the co-operative would vote for its members on an unknown order and in a Referendum not yet called and not held within a month thereafter."

Appellee, Rock Royal, made a similar attempt. It was not "qualified" as it had only had its plant in operation during August, 1938 (R. 255).

We respectfully urge that the referendum did not in any sense reflect the approval or disapproval by producers of the Order.

There are two other Points which should be made on behalf of appellees, but which cannot be included in this brief for want of time. On the argument, appellees will ask permission to file a short supplemental brief, cover-

ng these points, as well as to reply to briefs of appellants Dairymen's League and Bargaining Agency, if and when received, and the brief of appellant Noyes, to the extent necessary.

The judgment and decree of the lower Court, should be affirmed.

Respectfully submitted,

WILLARD R. PRATT,
Attorney for Appellees, Schuyler Junction New York Milk Shed Co-operative, Inc., and Jetter Dairy Company, Inc.,
Counsel for Appellee, Rock Royal Co-operative, Inc.,
Office and P. O. Address:
201-202 U. G. & E. Bldg.,
Utica, New York.

APPENDIX A.

THIS AGREEMENT, Made this.....day of .....193....., between DAIRYMEN'S LEAGUE CO-OPERATIVE ASSOCIATION, INC., hereinafter known as the Association, a corporation incorporated by and under the laws of the State of New York, and having its principal office and place of business at Utica, N. Y., party of the first part, and.....hereinafter known as the Producer, party of the second part, for the purpose of performing services for him connected with the production, manufacture, preservation, drying, canning, storing, handling, utilizing, marketing and selling of all the milk and milk products produced by him.

WITNESSETH:

That in consideration of the outlays, and expenses incurred and to be incurred by the Association in providing means for handling, manufacturing and marketing the milk and dairy products of the Producer as mentioned herein, the said parties have agreed to, and do hereby agree as follows:

1. The Producer, wishing to avail himself of the facilities to be furnished for marketing his milk and dairy products when the Association is equipped for same hereby appoints the Association his sales agent and as such grants to it full power and authority to sell said milk in the fluid state, or in its discretion to manufacture the same into such products as it may from time to time determine, and to sell such manufactured products, the proceeds of all such sales to be blended in one fund and distributed as hereinafter provided.

2. The producer covenants and agrees to and with the Association that if he at any time refuses or neglects to deliver such milk or the manufactured product thereof produced or manufactured by him to the Association or upon its order, at such time and place as the Asso-

cation may direct, then and in that event in every such case the Producer neglecting or refusing so to do will pay to the Association for such refusal or default, the sum of Ten Dollars ($10.00) per cow for.....cows, and if such default or refusal shall continue for more than one month, an additional sum of Three Dollars ($3.00) for each cow per month, for the same number of cows, so long as such default or refusal continues, none of which payments are to be construed to be a penalty or forfeiture, but as stipulated liquidated damages as prescribed by Section 37 of the Co-operative Corporations Law of the State of New York, and it is hereby agreed that the Association will suffer by reason of such refusal or default, it being agreed by the parties hereto that this agreement is one of a series of agreements with producers of milk, depending for its true value upon the strict adherence of each and of all of said producers to each and all of said agreements.

3. Such milk shall be delivered by the Producer to such shipping stations or other plants as the Association may from time to time direct, and to be of such test and quality, delivered at such hours and produced under such sanitary and hygienic regulations as may be required by the rules and regulations of the Association and the Board of Health, the City and the Laws of the State where the milk is produced and is to be finally marketed. If the Producer under the direction of the Association manufacturers such milk, the products thereof to be cleanly and wholesome and in good marketable condition.

4. The Producer will endeavor to follow the instructions of the Association as to the proportionate quantities of milk produced during the several months of the year, in order that an adequate supply for consumers at all seasons of the year may be assured.

5. It is further agreed that in case the Association fails to sell the milk of the Producer as herein stated, that the Producer will in each and every such case manufac-

ture such milk into such products as he may desire and deliver said manufactured product to the Association upon its order for sale, or if directed by the Association, will deliver such milk at such station or manufacturing plant as said Association may direct.

6. It is mutually agreed between the parties hereto that the Producer shall have the right to give away or retain for his own use such of his milk or other dairy products as he may wish, but the Producer shall not sell directly or through any agency any products contracted to the Association, to any outside party, except such products only as are offered to the Association as herein provided, and rejected by it, or upon written consent of said Association.

7. It is further mutually agreed that if the Producer is offered a price for his milk or dairy products in excess of the price then obtained by the Association, said Producer will turn over such offer to the Association.

8. For direct loans made by the Producer to the Association to provide initial capital, the Producer shall receive a certificate of indebtedness, one-fifth of which with interest shall be retired each year from the special fund herein mentioned to be created.

9. The proceeds of all sales made by the Association for the Producer shall be paid for by the purchaser or purchasers thereof to the Association, which proceeds, together with the proceeds of sales made by the Association for other producers, shall be blended into one general fund; the Association to make distribution thereof after making the deductions hereinafter stated, and pay over such funds to the Producer and to other producers in the same proportion that the quantities delivered by the several producers to the Association for sale shall bear to the whole, so that the price received by the Producer shall be uniform with that paid other producers, regardless of any variation or differences in the price received by the Association from such sale for the

several producers, subject to such equitable differentials as said Association may from time to time establish. The Association shall deduct from the proceeds of such sales such uniform percentages as they charge others for like services and which the said Association may deem necessary to meet the expenses already incurred, together with such other sums as may be necessary to cover interest, overhead, depreciation, guarantees and all such other expenses as may be reasonably estimated as essential to be incurred by the Association in conducting its operations, for which no certificates are to be issued.

10. The said Association shall also make further deductions to create a special fund to retire loans; to be used in building warehouses or other necessary buildings; to purchase land and buildings; to secure necessary equipment; to provide such working capital as said Association may deem necessary; such deductions for the special fund to continue as long as the Producer delivers milk or milk products to the Association for sale. After the close of each fiscal year, each producer shall receive a certificate in such form and payable at such time or times and at such rate of interest as such Association may from time to time determine for all moneys which he has contributed that year to the special fund from the percentages levied on his milk and dairy products, as herein provided, it being further agreed that the maturity of such certificates shall not exceed ten years and one month from the date thereof, and that the rate of interest thereon shall be not less than four per cent. per annum, nor more than six per cent. per annum.

11. The Producer agrees that said Association may also receive the proceeds of sales of other producers, and that said deductions as herein specified shall be uniform as to each producer, so that each producer will receive the same price per unit subject to such equitable differentials as may from time to time be established by the Association, distribution to be made by the Association

which is hereby appointed by the Producer sole arbitrator of the distribution of said sums, and such distributions when so made shall be final and conclusive and binding upon the parties hereto. The Producer, in the absence of fraud, hereby waives all his rights in law or in equity to an accounting thereof, and this contract shall act as a bar thereto in any proceeding taken by the Producer therefor.

12. All of the aforesaid distributions as herein provided are to be distributed to the Producer on or before the 25th day of each and every month for approximately the amount realized from the milk and dairy products sold and paid for during the previous month, after the aforesaid deductions have been made; and as soon after the fiscal year as all of said milk and dairy products handled as aforesaid have been sold and pay received therefor, full settlement is to be made to the producers thereof.

13. The Producer hereby authorizes the Association from time to time and at all times when in its judgment such action will promote its efficiency, to borrow money in its name and to secure repayment thereof to pledge part or all of any unsold milk and dairy products, accounts receivable, notes receivable and trade acceptances in which the Producer has any interest as owner or otherwise, the pledgee to be first paid from the proceeds thereof.

14. It is further mutually agreed that the Association may deduct from the proceeds of sales as herein provided, a further sum of One Dollar ($1.00) for each year, which shall be subscription to the *Dairymen's League News*.

15. The Producer agrees to execute an order directing the person or persons to whom any of his milk, cream or dairy products are now or hereafter delivered to pay the gross proceeds thereof to the Association and in the event of change of such buyer from time to time to execute such other and further orders as may be req-

nisite to enable the Association to make such collection, and receipt therefor, and hereby authorizes the Association, at any time when this contract is in effect, to change the name of the buyer named in any order executed under it, heretofore or hereafter, to the end that this contract may be performed. Also it is agreed that delivery to any buyer to whom Producer shall deliver milk produced by him during the term of this agreement of a copy thereof (certified by the Association to be a correct copy) shall be sufficient authority and direction for such buyer to pay all moneys due or to become due for such milk to the Association and shall constitute an assignment of such moneys to the Association.

16. The Producer hereby applies for membership in the Association, agrees to comply with all the requirements of the by-laws of said Association, and authorizes the Association in case this contract is cancelled, as herein provided, to deem such cancellation a withdrawal from the membership in this Association.

17. It is further mutually agreed that this contract shall run continuously unless cancelled by notice of either party to the other between the 12th and the 28th day of February, both inclusive, of any year, which notice shall be in writing and become effective on the 1st day of April then next ensuing, subject to any right or lien which the Association has against the Producer or his property until his indebtedness to the Association is fully paid, and subject to the rules and regulations prescribed by the by-laws of the Association.

IN WITNESS WHEREOF, the parties hereunto subscribed their names and affixed their seals, the.....day of.....193....

DAIRYMEN'S LEAGUE CO-OPERATIVE ASSOCIATION, INC.

By .....

President

..... (Seal)

Producer

.....

(Witness to Producer's Signature)